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Supreme Court, U.S.
FILED

No. 08-483 OCT 14 2008

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In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE &
GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300
* *Counsel of Record*

October 2008

QUESTIONS PRESENTED

1. Whether the court of appeals erred by declining to identify the "particular controversy giving rise to the defamation" of petitioner Steven Hatfill, as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and instead finding that Hatfill is a "limited purpose public figure" because he has some expertise relating to the broader issues discussed in the defamatory articles.

2. Whether the court of appeals erred by holding that Hatfill must show that the defamatory articles were *completely* fabricated to demonstrate "actual malice," even though the evidence revealed that some of the articles' allegations were fabricated and other statements made in the articles were embellished to support the allegation that Hatfill was the anthrax murderer.

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JURISDICTION

The judgment of the court of appeals was entered on July 14, 2008. The court denied en banc review on August 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After letters containing anthrax killed five people in the fall of 2001, *New York Times* columnist Nicholas Kristof published a column declaring "I think I know who sent out the anthrax." Pet. App. 66a. From May through August of 2002 he followed up with five articles accusing petitioner Steven J. Hatfill, M.D., of the murders. Pet. App. 70a-89a.

When The Times began publishing Kristof's articles, Hatfill was virtually unknown. But Kristof made Hatfill infamous. By the time of the lower court decisions here, Hatfill was known far and wide as the prime suspect in the anthrax killings. He had been fired from his job, effectively barred from his profession, and subjected to years of public contempt and ridicule.

Today we know that it was all a terrible tragedy rooted in Kristof's vivid imagination. In August 2008, the Department of Justice officially exonerated Hatfill and explained that Dr. Bruce Ivins, who had

committed suicide, had been solely responsible for the anthrax attacks.

Notwithstanding Hatfill's virtual anonymity at the time of the attacks, the court of appeals held that he was a "limited purpose public figure" (required to show "actual malice") because, *years* before the attacks, Hatfill made some obscure press appearances questioning the country's preparedness for a bioterrorism attack. The court of appeals further held that Hatfill failed to present sufficient evidence of "actual malice" to reach a jury because he could not show that Kristof had "*completely* fabricated" his accusations. Pet. App. 25a (emphasis by the court, quotation omitted).

The decision below contradicts common sense, this Court's precedents, and the decisions of other courts of appeals and state courts of last resort. It is absurd to say that Steven Hatfill became a public figure subject to accusations of murder with impunity because he urged better preparedness for bioterrorism. And it is even more absurd to say that a public figure cannot prevail in a defamation case unless he can show that the false accusations were "*completely* fabricated." This Court's decisions in defamation cases strike a balance between the public interest in giving the press some breathing space, primarily to uncover abuses by public officials, and the rights of private citizens to protect their good names. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). The Fourth Circuit has abandoned that balance, unreasonably enlarged the public figure category, and made it virtually impossible for

a public figure to demonstrate actual malice in a defamation case.

Background. Hatfill was a medical researcher who, unlike Ivins, never worked with anthrax. Hatfill did work from 1997 to 1999 at the United States Army Medical Research Institute for Infectious Diseases ("USAMRIID") in Fort Detrick, Maryland, where he collected and tested blood samples of primates infected with viruses. JA1909-10.[1] USAMRIID's biocontainment facilities stored anthrax, but Hatfill neither knew where it was stored, nor had access to the secure facilities in which it was studied. JA1912-14.

In January 1999, Hatfill took a private-sector job with Science Applications International Corporation ("SAIC"). SAIC hired Hatfill because it needed additional instructors to lecture in hospitals regarding preparedness for terrorist events. As part of his job, Hatfill sometimes gave similar lectures to military audiences. JA2005-06.

In five years at USAMRIID and SAIC, Hatfill made three appearances on radio and television, all in 1998. He was on CBS Radio's Armstrong Williams Show discussing mass terror incidents as background for an author promoting a book on the Tokyo subway attack. JA663-66. He participated in a Radio America program on bioterrorism with another speaker. *Id.* And at his USAMRIID supervisor's request he appeared fleetingly in a

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[1] "JA" references are to the Joint Appendix filed in the Fourth Circuit.

biohazard suit (but did not speak) on a Canadian Broadcast television show. JA2026-27.

Hatfill was twice quoted in the print media during 1997 and 1998. In August 1997, Hatfill's acquaintance Fred Reed of the *Washington Times* quoted Hatfill in a column addressing the threat of bioterrorism because Reed did not want to "source myself." JA1885. In January 1998, *Insight Magazine* interviewed Hatfill for a similar article regarding the risks of bioterrorism. A photo of Hatfill pretending to prepare a toxin (plague) in his kitchen, taken some time earlier, appeared in the article. In March 1998, the French-language magazine *Quebec Science* noted that Hatfill had allegedly "demonstrated" making plague in his kitchen, presumably as a result of the *Insight* photo. *Quebec Science* neither interviewed nor quoted Hatfill.

In September 1999, in conjunction with his hospital lectures for SAIC, Hatfill co-authored an article in the trade journal "Surgical Services Management," which – like the classes Hatfill taught – urged hospital health officials to increase bioterrorism preparedness. Also in 1999, author Richard Preston interviewed Hatfill regarding the threat of bioterrorism, but did not publish anything from that interview until 2002, after the anthrax attacks.

In sum, Hatfill's public appearances before the anthrax attacks included two radio appearances, one non-speaking TV appearance, and quotations in two print media articles, all in 1997 and 1998. Hatfill did not appear in the general media from March 1998

until after the anthrax killings more than three years later. Hatfill's handful of obscure media appearances in the 1990s did not gain him any renown. Kristof's sources – including his primary source, Dr. Barbara Hatch Rosenberg – testified that they never heard of Hatfill until after the anthrax murders. *See* JA1762-63, JA1820-27, JA1866-67.

Rosenberg believed that Hatfill was behind the attacks, perhaps as part of a secret CIA project. JA1756-57. As a result of Rosenberg's theory, which she publicized on the Internet, reporters began to seek out Hatfill to question him. The Fourth Circuit noted that following the attacks Hatfill "told ABC News that it was difficult to make anthrax," but the court did not clarify who contacted whom or why. Pet. App. 16a. In fact, in January or February of 2002, Vic Walter and Brian Ross of ABC News sought out Hatfill in an unsuccessful attempt to get him to agree to an interview so they could confront him with Rosenberg's accusation. *Nothing* was ever published in any medium as a result of ABC News' pursuit of Hatfill.

Also in January or February of 2002, Scott Shane, then a reporter for the *Baltimore Sun*, twice telephoned Hatfill, because he was interested in Hatfill as a "potential subject of the investigation." JA1673-74. During Shane's second call to Hatfill, he accused Hatfill of committing the anthrax attacks. JA664-65.

In late May and early June of 2002, William Broad, a science reporter for The Times, sent Hatfill two letters requesting an interview. Hatfill phoned

Broad to ask that Broad stop contacting him. JA1993, SA18-19.

Hatfill's press contacts *after* the anthrax attacks but *before* Kristof's published accusations thus comprised: (1) being approached by ABC News and refusing to sit for an interview; (2) being accused by a Baltimore Sun reporter of the murders; and (3) declining to talk to The Times.

Kristof's Columns. After contacting Rosenberg about her insider theory, Kristof wrote five columns from May 24 to August 13, 2002 about the "likely culprit" in the anthrax attacks, whom the columns called "Mr. Z." Many readers recognized "Mr. Z" as Hatfill and Kristof acknowledged that "Mr. Z" was Hatfill in the final column. *See* Pet. App. 86a. Despite numerous warnings from experts and colleagues about Rosenberg's dubious expertise and credibility, *see* JA1749, JA1862-63, JA1920. Kristof focused exclusively on Hatfill as his "suspect."

Hatfill's suit alleged that Kristof's columns falsely accused him of committing the anthrax murders, based on a variety of false statements implying that Hatfill had the ability, access, and motive to make and send "dry" anthrax. ("Wet" anthrax is not as dangerous, and highly specialized expertise is required to convert it to its lethal "dry" form.) For example, Kristof falsely claimed that Hatfill had access to an "isolated residence" that was a CIA "safe house" and gave Cipro – an antibiotic used to treat anthrax – to people who visited it, thereby implying that Hatfill *had* used the location to make anthrax. Pet. App. 76a. Kristof also falsely wrote that Hatfill

had failed three polygraph examinations, suggesting that Hatfill had repeatedly lied to the FBI about the murders. *Id.* at 87a. In addition, Kristof falsely stated that Hatfill had traveled under an "alias," *id.* at 76a, suggesting that Hatfill had something to hide. Kristof also claimed that "specially trained" bloodhounds had "responded strongly" to Hatfill eleven months after the murders, *id.* at 87a, notwithstanding that another journalist had already debunked the story. And so on: Kristof alleged that Hatfill was one of a "handful" of people who had the ability to make and send dry anthrax, *id.* at 72a; that he "unquestionably had the ability to make first-rate anthrax," *id.* at 72a; and that his anthrax vaccinations were up to date, *id.* at 72a – all false.

Kristof's effort to "light a fire under the F.B.I." to investigate Hatfill, *id.* at 73a, succeeded. The FBI searched Hatfill's apartment on June 25, 2002, and, as a result of an unlawful leak by law enforcement officials, the search was televised.[2] Although nothing incriminating was found, Kristof continued to write columns urging the FBI to further investigate Hatfill. The FBI conducted another televised search on August 1, again finding nothing, but Attorney General Ashcroft identified Hatfill as a "person of interest" in the anthrax investigation on August 6, 2002, on both NBC's "The Today Show" and CBS's "The Early Show." Kristof then wrote his final column in the series, congratulating the FBI for finally making progress. *Id.* at 88a-89a.

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[2] Hatfill recently settled his separate Privacy Act suit against the federal government.

The Decisions Below. Hatfill sued The Times for defamation and intentional infliction of emotional distress in the Eastern District of Virginia, based on diversity jurisdiction. The district court dismissed the complaint, holding that no reasonable person could find Kristof's columns defamatory. The Fourth Circuit reversed, finding that "a reasonable reader of Kristof's columns likely would conclude that Hatfill was responsible for the anthrax mailings." *Hatfill v. New York Times Co.*, 416 F.3d 320, 333 (4th Cir. 2005).

During discovery after remand, Kristof refused to identity two anonymous FBI sources who had purportedly told him that Hatfill had failed three polygraph examinations. Magistrate Judge O'Grady ruled that Hatfill had a "'compelling interest'" in obtaining the identifications of the alleged sources. Pet. App. 62a. The court reasoned that if (as Hatfill expected) the individuals denied being the sources that would further suggest that Kristof was reckless in making the accusation.

District Judge Hilton granted The Times' motion for summary judgment without explaining how that dismissal could be consistent with Judge O'Grady's conclusion that Hatfill had a compelling need for evidence being withheld by The Times. The court held that Hatfill was a "limited purpose public figure" required to prove actual malice, and that he had not offered sufficient evidence to reach a jury. Pet. App. 43a.

The Fourth Circuit affirmed. The court rejected Hatfill's argument that his limited participation in a

general debate regarding the nation's preparedness for biological attack from 1996 to 1998 did not make him a public figure for purposes of the "particular" public controversy regarding the 2001 anthrax attacks. *Gertz*, 418 U.S. at 345. The court further held that the actual malice standard "demands evidence of the 'publication of a *completely* fabricated story.'" Pet. App. 25a (quoting *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980)). Because Kristof cited some facts that were *not* fabricated, the court indicated, it did not matter that Kristof had fabricated *some* allegations and stretched the truth with respect to others. Finally, the Fourth Circuit appeared to misunderstand Hatfill's argument that summary judgment on the malice issue was particularly inappropriate because Kristof had refused to identify his alleged FBI sources. Although Hatfill had argued that denials by those alleged sources would help to support a finding of actual malice, the court of appeals treated Hatfill's argument as a challenge to the adequacy of the evidentiary sanction imposed by the district court. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

This Court should review the Fourth Circuit's decision because it is inconsistent with the precedents of this Court, other courts of appeals, and state courts of last resort. Moreover, if Hatfill is a "limited purpose public figure" with respect to the controversy concerning who committed the anthrax murders – a controversy that Hatfill avoided – on account of a handful of appearances years earlier

advocating better preparedness for bioterrorist attacks, then that category has been broadened beyond any reasonable limit. Similarly, if a public figure must show that the accusations against him were "*completely* fabricated," there is no meaningful limit to the false attacks that may be made on limited purpose public figures.

I. THE COURT SHOULD REVIEW THE FOURTH CIRCUIT'S REFUSAL TO IDENTIFY THE "PARTICULAR PUBLIC CONTROVERSY" GIVING RISE TO THE DEFAMATION.

A. The Fourth Circuit's Decision Is Inconsistent With *Gertz*.

Gertz is this Court's seminal case on "limited purpose public figures." It establishes a balance between protecting the media against defamation suits that might lead to self-censorship and the competing value of "the individual's right to the protection of his own good name." *Id.* at 341.

The *Gertz* Court found that public figures, like public officials, may "occupy positions of such persuasive power and influence" that they "run[] the risk" of "public scrutiny" for "all purposes." *Id.* at 344-45. "More commonly," however, "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. Such individuals "invite attention and comment" with respect to the "particular" public controversies they seek to influence. *Id.*

Gertz thus requires courts to distinguish the *particular* public controversy as to which an individual has invited attention and accepted the risk of scrutiny from the individual's involvement in public life generally. The Court's analysis in *Gertz* did exactly that. The Court first found that petitioner was not a "public figure for all purposes" because he had "achieved no general fame," even though he had "served as an officer of local civic groups and of various professional organizations, and he ha[d] published several books and articles on legal subjects." *Id.* at 351. Indeed, other authorities have noted that Gertz had "authored four books and 'thousands' of articles in legal, historical, and literary publications, had been the subject of forty articles in Chicago papers, and had made many television and radio appearances." *See, e.g., Bruno &. Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 588 n.14 (1st Cir. 1980) (citing *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558 (E.D. Mich. 1979)).

Instead of looking broadly at Gertz's public appearances, this Court found it should "reduce the public-figure question to a more meaningful context by looking to the nature and extent of [Gertz's] . . . participation *in the particular controversy giving rise to the defamation*." *Id.* (emphasis added). The "particular controversy giving rise to the defamation" in *Gertz* concerned the murder of a Chicago youth by a city policeman. The Court carefully limited its inquiry concerning petitioner's public life to that controversy. The Court did *not* consider the relationship between the particular controversy at issue and Gertz's participation (if any) in broader

societal debates. Accordingly, this Court's opinion in *Gertz* does not reveal whether Gertz's many books, articles, and appearances addressed broader societal debates such as police brutality, the then-rapidly growing problem of homicide in Chicago, the possible threats that communism or communist activists may have been thought to pose to society at the time, or any other subject beyond the "particular controversy giving rise to the defamation." Under *Gertz*, the issue is the extent of an individual's participation in the *particular controversy giving rise to the defamation.*

Before the court below, Hatfill argued that, under *Gertz*, any general public debate concerning the nation's preparedness for biological attack – a "debate" in which Hatfill attained no special prominence in any event – was *not* the "particular" public controversy giving rise to the defamation. Rather, the controversy was about who committed the 2001 anthrax murders and whether law enforcement authorities were doing enough to apprehend the criminals. *That* controversy – in which Hatfill had *no* voluntary involvement – was the particular controversy giving rise to the defamation.

Hatfill further argued that the policies underlying *Gertz* make it critical to draw this distinction between the broad debate in which Hatfill had voluntarily played a minor role and the particular controversy about which Kristof wrote. The *Gertz* Court focused on the extent to which an individual should be considered to have voluntarily "run[] the risk" of close public scrutiny, or to have "invite[d]

attention and comment." 418 U.S. at 344-45. By choosing to represent the family of the victim in *Gertz*, the plaintiff there could not reasonably be considered to have accepted the risk of being accused of being a criminal or a Communist. Similarly, by educating first responders about the need to prepare for biological attack, Hatfill could not reasonably be considered to have accepted the risk of being accused of murdering people with anthrax.

Ignoring the distinction made by *Gertz* has dire implications for public discourse. For example, there is undoubtedly a public controversy today regarding gun control, with some experts urging that the government has not done enough to curb gun ownership and others arguing that it has done too much. But if Hatfill were an expert taking part in that debate – publicly lobbying, for example, against extending handgun bans to rifles – he ought not with impunity be falsely accused of shooting shoppers in parking lots with a rifle. Similarly, if Hatfill were an expert on nuclear weapons – arguing, for example, that battlefield nuclear weapons should be part of the United States' arsenal – he ought not with impunity be falsely accused of exploding a dirty bomb in the Metro. If he were an expert on teenage sexual behavior – arguing, say, for more sexual education in our schools – he ought not with impunity be falsely accused of molesting a neighbor's child. Such terrible crimes would undoubtedly generate particular public controversies – but those would be very *different* controversies from the broad debates in which experts voluntarily engage. A contrary result would

open any expert on a controversial subject to false accusations of heinous crime.

That is among the dangers posed by the decision below, which effectively reads the word "particular" out of *Gertz*. Rather than focus on any "particular" controversy, the Fourth Circuit found that it should examine the scope of the issues addressed by The Times' articles and then consider whether Hatfill had ever spoken publicly on an issue raised in the articles: "[T]he 'use of the word "particular" signifies only that a court must identify the specific or "particular" controversy or controversies fairly addressed *by the publication* at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified.'" Pet. App. 19a (quoting without citation from The Times' brief at 44) (emphasis added). This approach turns *Gertz* on its head. Instead of identifying the "particular controversy giving rise to the defamation" and examining whether the plaintiff has thrust himself into *that* controversy, the Fourth Circuit looked broadly at *every* issue raised by the articles in which the defamation happened to appear, and examined whether the plaintiff voluntarily participated in debate on any such issue.

The lower court's approach is irreconcilable with *Gertz*. Again, the *Gertz* Court did not catalog the topics covered by the defamatory article there – which surely included, for example, discussion of the perceived threat from communism generally – and then examine Gertz's voluminous writings and frequent appearances to determine whether he had

ever addressed any of those topics. From the *Gertz* Court's analysis, we have no idea whether Gertz ever spoke or wrote on communism because, under this Court's analysis, that was beside the point. The point was that the defamation arose from a *particular* public controversy surrounding a murder with which Gertz had no connection. The same is true here.

The error in the court's analysis below is *not* the misapplication of law to fact. Rather, the legal rule articulated by the lower court fundamentally distorts the analysis required by *Gertz*. Moreover, it does so because the lower court failed to credit the balance struck by *Gertz* and the policies underlying that balance. The lower court wrote that *the* "purpose of the public figure doctrine [is] to encourage robust and uninhibited commentary on public issues." Pet. App. 20a. But that is only *one* of the purposes of the doctrine. As the *Gertz* Court wrote, "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341. This Court has not done so. Rather, it has "sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." *Time v. Firestone*, 424 U.S. at 456. The lower court flatly ignored this Court's balance.

B. The Fourth Circuit's Decision Is Inconsistent With Other Decisions Of This Court.

The Fourth Circuit's reliance on Hatfill's contacts with the press *after* the anthrax attacks conflicts with decisions of this Court other than *Gertz*. As explained above, Hatfill *resisted* the efforts by the *Washington Times*, *Baltimore Sun*, and *New York Times* to interview him because he perceived that they wanted to accuse him of being the murderer.

Efforts by reporters to bait someone they suspect of a crime into an interview so as to confront him with an accusation plainly do not represent the suspect "thrusting" himself "to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. In *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), Wolston had pleaded guilty to criminal contempt for failing to testify in connection with the government's investigation of Soviet espionage. A book later accused him of being a Soviet spy. This Court rejected the argument that Wolston's contempt conviction made him a public figure: "It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy. The Government *pursued him* in its investigation." *Id.* at 166 (emphasis added). The same is true of Hatfill – reporters *pursued him* in their reporting of the anthrax murders, but under this Court's precedents, that does not make him a public figure.

More recent cases confirm this rule. For example, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the

plaintiff was a behavioral scientist who received federal funds for conducting research on primates. Respondent was a senator who "awarded" plaintiff a "Golden Fleece Award" for wasting the public's money. This Court observed:

> Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.

Id. at 135. The Court concluded that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* Hatfill's "activities and public profile [were] much like those of countless" other researchers and lecturers on the subject of bioterrorism. Indeed, there were surely dozens (if not hundreds) of professionals in the field better known than Hatfill, who had *one* minor publication in a specialized trade magazine. To the extent that Hatfill gained notoriety, it is *because* of unjustified attacks by Kristof and others in the media.

The court below also relied on contacts between Hatfill and the press that occurred *after* Kristof's published accusations against him. The lower court ignored this chronology, presumably because it thought the point irrelevant. But under this Court's precedents, the point is directly relevant. Being

accused of murder attracts a good deal of press attention, and accused individuals are often highly motivated to deny the accusations. But such contacts do not for a moment suggest that Hatfill "voluntarily" thrust himself into the controversy surrounding the anthrax investigation. *See Time v. Firestone*, 424 U.S. at 455 n.3 ("[T]he fact that respondent may have held a few press conferences . . . to satisfy inquiring reporters" did not "convert[] her into a 'public figure.'").

C. The Fourth Circuit's Decision Conflicts With Decisions Of Other Circuits And State Courts Of Last Resort.

The standards applied by courts of appeals and state courts of last resort to determine who is a "limited purpose public figure" vary dramatically. Because the facts of every defamation case are different, the conflict among the courts is perhaps less obvious than it would be on a simple matter of statutory interpretation, but it is just as real. This Court should grant certiorari to ensure that the lower courts uniformly apply the analysis required by *Gertz*.

Some courts have no trouble following this Court's guidance. The D.C. Circuit's decision in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), cogently summarized what this Court's precedents require. The court began by quoting *Gertz*'s holding that it must examine "'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Id.* at 1292 (quoting *Gertz*, 418 U.S. at

352). The "first step" in that inquiry is to "isolate the public controversy." *Id.* at 1296. The court further explained that, under *Gertz* and *Wolston*, a plaintiff may well be a limited purpose public figure in connection with one public controversy, but *not* in connection with a related controversy or "subcontroversy." *Id.* at 1296-97. The second step in the analysis – after the "the court has defined the controversy" – requires analyzing whether plaintiffs have "'thrust themselves to the forefront'" of that controversy. *Id.* (quoting *Gertz*, 418 U.S. at 345). "Finally," the *Waldbaum* court found, "the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Id.* at 1298.

The *Waldbaum* court's analysis has been adopted by other circuits. The Eleventh Circuit, for example, has found that "[t]he proper standards for determining whether plaintiffs are limited public figures are best set forth in *Waldbaum*." *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988). The *Silvester* court summarized those standards as follows: "Under the *Waldbaum* analysis, the court must (1) isolate the public controversy, (2) examine the plaintiffs' involvement in the controversy, and (3) determine whether 'the alleged defamation [was] germane to the plaintiffs' participation in the controversy.'" *Id.* The Seventh and Ninth Circuits have also recognized the *Waldbaum* analysis – *see, e.g.*, *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir. 1986) ("Both parties agree that application of the three-part test for determining limited purpose public figures

enunciated in *Waldbaum* . . . is proper."); *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) ("The district court found that plaintiffs are limited purpose public figures under the test established in *Waldbaum*."). Moreover, state courts of last resort continue to adopt the *Waldbaum* approach. *See, e.g., Cottrell v. National Collegiate Athletic Association*, 975 So.2d 306, 334 (Ala. 2007) ("[T]his Court adopts [the three-pronged *Waldbaum* test] and will now apply it to the facts of this case."); *Lassonde v. Stanton*, 2008 N.H. LEXIS 99, *13-14 (N.H.) ("'As the first step in [the limited-purpose public figure] inquiry, the court must isolate the public controversy.'") (quoting *Waldbaum*, 627 F.2d at 1296).

The Eighth Circuit's application of the *Waldbaum* standards in *In re: IBP Confidential Business Documents Litigation*, 797 F.2d 632, 645-47 (8th Cir. 1986), illustrates how those standards should apply here. Defendant IBP argued that the plaintiff, Bagley, was a limited purpose public figure because in 1977 and 1978 he repeatedly met "freely and voluntarily" with attorneys involved in "extensive antitrust litigation against IBP" to share internal IBP documents about the company's competitive practices. *Id.* at 636, 646. In 1979, those practices became the subject of House subcommittee hearings in which IBP submitted a letter containing false accusations against Bagley. *Id.* at 638-39. The Eighth Circuit held that the "particular public controversy" giving rise to IBP's defamatory speech was the subcommittee's 1979 investigation of IBP – the earlier "activities relied on by IBP were distinct from and unrelated to Bagley's involvement in the

particular public controversy 'giving rise' to the [defamatory] letter." *Id.* at 646.

Under the *Waldbaum* standard, there is no question that Hatfill is not a limited purpose public figure. The alleged defamation was Kristof's accusation that Hatfill committed the anthrax killings. It follows that the particular public controversy "giving rise" to the defamation was the anthrax investigation. In the words of the *Waldbaum* court, "[a] general concern or interest" in the nation's preparedness for bioterrorism of the sort Hatfill expressed in the late 1990s "will not suffice" to constitute a "public controversy" under *Gertz*. 627 F.3d at 1297. Moreover, in the words of the *IBP* court, Hatfill's occasional commentary during that time on issues of bioterrorism was "distinct from and unrelated to [his] involvement [or, in Hatfill's case, his lack of involvement] in the particular public controversy 'giving rise' to the" defamation. 797 F.2d at 646. The decision of the Fourth Circuit below fails to "isolate" the public controversy giving rise to the defamation, in contrast to the *Waldbaum* approach.

Unfortunately, the Fourth Circuit is not alone in ignoring this important element of the limited purpose public figure analysis. Contrary to *Gertz*, a number of circuits apply standards that do not call for isolating the particular controversy giving rise to the defamation, or require anything more than a "general concern or interest" to qualify as a public controversy. In *Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984), the Second

Circuit held that a plaintiff is a "limited purpose public figure" if he has:

> (1) successfully invited public attention to his views in an effort to influence other[s] prior to the incident that is the subject of litigation;
>
> (2) voluntarily injected himself into a public controversy related to the subject of the litigation;
>
> (3) assumed a position of prominence in the public controversy; and
>
> (4) maintained regular and continuing access to the media.

Like the Fourth Circuit, the Second Circuit makes no effort to ensure that the plaintiff voluntarily injected himself into the *particular* controversy that gave rise to the defamation – it is sufficient that the plaintiff "invited public attention to his views" on *any* public controversy *related* to the subject of the litigation.

Lerman illustrates how dramatically this difference in legal standards affects analysis of "limited purpose public figure" issues. The plaintiff in *Lerman* – better known as Jackie Collins – sued because a magazine claimed that she had appeared in an orgy scene in an adult film, complete with pictures falsely identifying her. The Second Circuit found that Lerman was not a public figure for all purposes. *Id.* at 137. But because Lerman's books were "racy" and "sexy," and because she appeared in the media criticizing "inequality in the treatment accorded females vis-à-vis males," the court found that Lerman was a public figure for purposes of a

"public controversy" regarding the "relations between the sexes and public nudity." *Id.* The Second Circuit rejected the district court's holding that "such a topic is merely a matter of interest, but not a true public controversy." *Id.* The appellate court did not even attempt to explain how Lerman, by writing sexy books and advocating gender equality, participated in a "particular" controversy that "gave rise" to an accusation that she appeared in an orgy scene. *Gertz*, 418 U.S. at 344-45. The Second Circuit thus applies a standard much like that applied by the Fourth Circuit in this case.

The Third Circuit similarly ignores *Gertz*'s requirement that the plaintiff participate in a "particular" public controversy giving rise to the defamation. In *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1077 (3rd Cir. 1985) (emphasis omitted), Marcone claimed that Penthouse's report that Marcone had engaged in a marijuana transaction and that the charges against him were dropped only because Marcone "cooperated with further investigations" was false and defamatory. The Third Circuit found that whether Marcone was a limited purpose public figure depended on "(1) whether drug trafficking is a 'public controversy' and (2) the 'nature and extent' of Marcone's participation in this controversy." *Id.* at 1082. The court devoted only a paragraph to concluding that "[d]rug trafficking" is "one of the most troubling issues of our time" and "surely falls within the ambit of public controversy." *Id.* at 1083. Like the Fourth Circuit in this case and the Second Circuit in *Lerman*, the *Marcone* court did not even

attempt to identify a *particular* public controversy as required by *Gertz*.[3]

Under the standards applied by the Second, Third, and Fourth Circuits – in contrast to the D.C., Seventh, Eighth, Ninth, and Eleventh Circuits – an individual is a limited purpose public figure if he has "invited public attention to his views" on *any* public controversy *related* to the subject of the litigation. Under this approach, *any* expert on a subject involving public controversy may with impunity be accused of *any* related crime – just as the Fourth Circuit held that Hatfill could be accused of murder because of his expert appearances addressing bioterrorism.

In *Gertz*, this Court attempted to strike a *balance* between two competing concerns. Today, there is confusion about that balance in the lower courts, with one "limited purpose public figure" test that respects this Court's balance and an equally influential one that does not. This Court should grant certiorari to resolve the conflict by correcting those courts that have disregarded the command in *Gertz* to identify a *particular* public controversy giving rise to the defamation so as to limit the situations in which reputations may be destroyed with impunity.

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[3] Just as the *Waldbaum* approach continues to influence state courts of last resort, *see supra* at 18-21, other such courts continue to look to the contrasting approach of *Lerman* and *Marcone*. *See, e.g., State v. Carpenter*, 171 P.3d 41 (Alaska 2007) (urging adoption of the *Lerman* test) (Carpeneti, J., concurring).

II. THE COURT SHOULD REVIEW THE HOLDING THAT "ACTUAL MALICE" REQUIRES A SHOWING THAT DEFAMATORY ARTICLES WERE "*COMPLETELY* FABRICATED."

To show actual malice, a plaintiff must show that the defendant published a false statement with "knowledge of falsity or reckless disregard as to truth or falsity." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). Hatfill presented considerable evidence supporting his claim that Kristof wrote the articles accusing Hatfill of being the anthrax murderer even though he either knew that the charge was false or, at the least, that he made his false allegations recklessly. The Fourth Circuit *did not review* the vast bulk of that evidence. Instead, it satisfied itself that there was *some* truth to the evidence Kristof presented suggesting that Hatfill *might* be the anthrax murderer, and held that because the charge was not "*completely* fabricated," Pet. App. 25a (emphasis by the court), Hatfill had necessarily failed to establish actual malice.

This approach contravenes the precedents of this Court and other courts of appeals, and also makes no sense. Where (as here) the evidence demonstrates that a reporter fabricated *some* elements of a false accusation, a reasonable jury could conclude that the author doubted the truth of his allegation or there would have been no need to fabricate evidence.

A. The Fourth Circuit Ignored Evidence Of Actual Malice Because The False Allegations Were Not "*Completely* Fabricated."

A brief review of the evidence shows that the Fourth Circuit's "*completely* fabricated" rule caused it to ignore substantial evidence showing that Kristof either doubted the truth of his assertion that Hatfill was the anthrax murderer or recklessly made claims supporting that assertion.

The claim that Hatfill dispensed Cipro at a "safe house." One of Kristof's most damaging allegations was that Hatfill had access to an "isolated residence" and "gave Cipro to people who visited it." Pet. App. 76a. Kristof also suggested that the "isolated residence" might be a "safe house[] operated by American intelligence." *Id.* This accusation is extremely harmful because it identified a specific location where Hatfill might have made the anthrax that was used to kill people. The allegation concerning Cipro – an antibiotic used to treat people exposed to anthrax – was particularly damning, because it strongly suggested that Hatfill in fact *had* used the "isolated residence" to make or send the anthrax and needed to ensure that visitors were not harmed by exposure to anthrax. A reader of the column commented: "it is amazing what you found out – the building, the Cipro. . . . it really is incredible. it's almost too perfect." Ex. 54.[4]

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[4] Citation is to an exhibit submitted to the district court.

But this claim is entirely untrue. The "isolated residence" was, in fact, a house owned by attorney George Borsari, who testified that "there's no way in the world Steve Hatfill could have made anthrax at my house." JA1926. In addition, Borsari's house was not a CIA "safe house." There is simply no basis at all for that bizarre allegation. Kristof first said that he thought he "had heard that idea from somebody and thought it was from Barbara [Rosenberg]." JA1799. Rosenberg, however, first heard this allegation from *Kristof*. JA1772-76, JA1778, *see also* JA1934. Confronted with Rosenberg's emails to this effect, Kristof described his allegation as "partly guesswork" based on a "tantalizing possibility." JA1798-99. That amounts to clear and convincing evidence that Kristof simply fabricated the allegation.

The allegation that Hatfill failed three polygraph examinations. Kristof wrote that Hatfill had "failed three successive polygraph examinations since January." Pet. App. 87a. That is a damaging allegation because it implies that Hatfill repeatedly lied to the FBI about his involvement with the anthrax murders. The allegation is false. Hatfill took one FBI polygraph examination and was told by the examiner that he passed. *See* JA1945.

Kristof claims that two FBI agents – known as "confidential sources #2 and #3" – provided this information. JA1811-12. The magistrate concluded that Hatfill needed to depose these sources to "determine if Mr. Kristof accurately reported information the sources provided," in part because

the magistrate concluded that Rosenberg's "testimony contradicts Mr. Kristof's testimony regarding what Dr. Rosenberg told him." JA 99, 107. Because Kristof's "state of mind . . . is central to this dispute," the magistrate held that Hatfill had a "compelling interest in the information." JA 99, 100.[5]

After Kristof failed to identify his sources, the magistrate ordered that The Times "not be allowed to refer to, rely on, or enter into evidence t[he] existence of Confidential Source #2 or #3." JA 107. As a result, the magistrate stated, The Times "is left with little to no explanation for some of the allegedly defamatory statements which Defendant published." *Id.* Under the magistrate's order, The Times has *no* source for the allegation that Hatfill failed three polygraph examinations. In that circumstance, a reasonable jury could conclude that, as with the "safe house" allegation, Kristof simply fabricated the allegation as "tantalizing guess work."

The Hatfield "alias." In the July 2 column, Kristof said that he had "found at least one alias" allegedly used by Hatfill. This is a damaging

---

[5] Kristof identified Rosenberg, Meryl Nass, and Milton Leitenberg as sources for the claim that Hatfill unquestionably had the ability to make first-rate anthrax, JA1789-90 (referring to a confidential source later identified as Nass), but each denied being his source. JA1764-65; JA1853-55; JA1866. Kristof also claimed that Rosenberg and Nass told him that Hatfill had up-to-date vaccinations, but each denied that she had been the source for that information. JA1809-10 (referring a to confidential source later identified as Nass); JA1766-67; JA1865-67.

allegation because honest citizens, unlike anthrax murderers, do not need aliases. But the "alias" was a common misspelling of Hatfill's name, "Steven Hatfield." JA1937. Kristof, who on this logic sometimes uses the alias "Kristoff," did not identify the supposed alias in his columns, thereby willfully misleading his readers while concealing the obvious weakness of the allegation.

The miracle bloodhounds. Kristof wrote that "[s]pecially trained bloodhounds were given scent packets preserved from the anthrax letters," and "responded strongly" to Hatfill. Pet. App. 87a. Common sense refutes the idea that a bloodhound – specially trained or otherwise – could identify a person from the scent of a letter mailed 11 months previously and on which the mailer had left no DNA. Scott Shane of the *Baltimore Sun* had reached that conclusion and debunked the "bloodhound evidence" in a report published five days before Kristof included it in his column. *See* JA1950-52. Kristof did not investigate, but instead chose to publish a story "so inherently improbable that only a reckless man would have put [it] in circulation." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The Fourth Circuit's basis for ignoring the evidence showing actual malice. The Fourth Circuit did not address any of the evidence discussed in the text above – even though all of it and more was presented at length (pages 37-46) in Hatfill's opening brief. Instead, the court cryptically alluded to some of the evidence and dismissed it in the two-sentence paragraph *after* its holding that a

defamation plaintiff must present evidence of a "*completely* fabricated story." Pet. App. 25a. Thus, even though, as discussed below, Hatfill's evidence is at least as compelling as the evidence of actual malice that this Court found sufficient in *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) and *Masson*, the court of appeals found it irrelevant because it concluded that *other* evidence giving Kristof a basis for believing that Hatfill was the anthrax murderer rendered Hatfill's evidence of malice irrelevant.

The court presented in one paragraph the evidence purportedly showing that "the record contains substantial evidence to support The New York Times' contention that Kristof *actually believed* that Dr. Hatfill was the prime suspect." Pet. App. 24a. In fact, however, Kristof himself has *never* claimed that he "believed" Hatfill was the anthrax murderer, but instead he "remained 'agnostic'" on that issue. Times' Brief at 52 (quoting *Howard v. Antilla*, 294 F.3d 244, 254 (1st Cir. 2002)). Kristof's position was consistent with The Times' argument, rejected by the Fourth Circuit in 2005, *Hatfill*, 416 F.3d at 332-33, that the articles did not accuse Hatfill of being the anthrax murderer. Usually, the reporter in a defamation case testifies that he believed the allegedly defamatory accusation – although this Court has held that a defendant cannot "insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant*, 390 U.S. at 732. When, as here, a reporter remains "agnostic" concerning the truth of his allegations, it almost necessarily follows that

there is a jury question as to whether the reporter knew that his allegations were false or he advanced them recklessly.

Moreover, the evidence the court cited to show that Kristof "actually believed" that Hatfill was the murderer boils down to the contention that Hatfill was a scientist who worked at Fort Detrick, where anthrax was stored, and (like many scientists there) had some knowledge of anthrax, and therefore (like the other scientists at Fort Detrick) the FBI had investigated him. Such minimal evidence, however, does not support the court's conclusion that *no* "reasonable jury could find that Kristof had a 'high degree of awareness' that Dr. Hatfill was *not* the anthrax mailer," Pet. App. 25a, where Kristof fabricated additional "evidence" and otherwise embellished the facts. If Kristof had genuinely believed that the existing evidence pointed to Hatfill, there would have been no need to manufacture more.

Lest the Court think that the Fourth Circuit could not really have meant that only a "*completely* fabricated" allegation shows malice, it is clear that the Fourth Circuit so held. First, whether a "complete" fabrication is required was debated in the briefs. The Times argued in its brief (at 58) that the Fourth Circuit's decision in *Ryan v. Brooks* required a "'*completely* fabricated story,'" emphasizing "completely." In our reply brief (at 29), we explained: "There is no basis in law or logic for the theory that a publisher may fabricate extremely damaging accusations by including some innocuous material that happens to be true." The Fourth Circuit then

adopted The Times' contention by quoting *Ryan v. Brooks* and emphasizing "completely," just as The Times had. Pet. App. 25a. Second, as discussed above, the court simply ignored Hatfill's evidence that Kristof fabricated some allegations and distorted other facts immediately after saying that Kristof had not "*completely* fabricated" his accusation.

B. The Fourth Circuit's Decision Is Inconsistent With Decisions Of This Court.

The Fourth Circuit's "*completely* fabricated" rule is inconsistent with this Court's decision in *Harte-Hanks*. There, a woman named Alice Thompson claimed that "'Dan Connaughton, candidate for Hamilton Municipal Judge,'" offered her and her sister jobs in exchange for helping to show corruption by an employee of the incumbent judge. 491 U.S. at 680. Connaughton sued the newspaper publishing Thompson's allegations for defamation. This Court noted that "[e]ach of Thompson's allegations was accurately reported." *Id.* Moreover, the newspaper had interviewed Connaughton, who "acknowledge[d]" that he had suggested that the sisters might be able to work for his wife if she opened an ice cream shop. *Id.* at 677-678.

Notwithstanding that the newspaper had followed up to ensure that there was some truth to the allegations, this Court faulted the paper for failing to interview Thompson's sister to see if she would corroborate the accusation and for failing to listen to recordings that could have confirmed

whether Thompson's story was accurate. *Id.* at 682-683. The Court reasoned that the jury could reasonably have concluded that the paper did not interview the sister or listen to the tapes because it wanted to run the story without learning anything that undermined Thompson's story. *Id.* Plainly, however, under the Fourth Circuit's *complete* fabrication rule, *Harte-Hanks* would never have gone to the jury because Connaughton admitted making a statement that Thompson could have interpreted as a job offer. The article, in short, was not a *complete* fabrication.

Moreover, the Court explicitly rejected the argument that the newspaper could "claim immunity from suit because portions of Thompson's account of the relevant events were confirmed by Connaughton." *Id.* at 692, n.37. It added: "'[T]he defamer may be [all] the more successful when he baits the hook with truth.'" *Id.* at 692 n.37 (quoting, *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966)). There is no room under this Court's reasoning for the Fourth Circuit's "*complete* fabrication" rule, under which baiting the hook with truth immunizes any defamatory statements that follow.

Moreover, Kristof was guilty of the same error the Court identified in *Harte-Hanks*. He failed to contact George Borsari, the owner of the alleged "safe house" where Hatfill gave Cipro to visitors, even though Borsari described himself as "the easiest person in the world to track down." JA1925. A jury could

reasonably conclude that Kristof did not want to learn anything that undermined his "guesswork."

The Fourth Circuit's approach is also inconsistent with this Court's decision in *Masson*. The defendant there was an author who wrote a book about Masson using inaccurate quotations from him that "portray[ed] him in a most unflattering light." 501 U.S. at 501. The district court granted summary judgment because "the allegedly fabricated quotations were either substantially true, or were one of a number of possible rational interpretations of a conversation or event that bristled with ambiguities." *Id.* at 508-09 (internal quotation marks deleted). The Ninth Circuit affirmed "for the reasons stated by the District Court." *Id.* at 509. Essentially, both courts held that while the quotations were fabricated, they were not "*completely* fabricated." This Court reversed.

C. The Fourth Circuit's Decision Is Inconsistent With Decisions Of Other Circuits.

No other court of appeals has adopted a "*completely* fabricated" rule. Many have reversed grants of summary judgment that would be affirmed under the Fourth Circuit's standard.

For example, *Rebozo v. Washington Post Co.*, 637 F.2d 375, 377 (5th Cir. 1981), involved an article alleging: "Rebozo, President Nixon's close friend, cashed $91,500 in stolen stocks in 1968 after he was told by an insurance investigator it was stolen, the investigator's sworn statement and other records in a Miami court file indicate." But there was some

ambiguity as to what the "sworn statement" of the insurance investigator actually "indicated." The investigator had told Rebozo that he "was investigating the theft of nine 100-share certificates" that matched the numbers of certificates in the possession of Rebozo's bank. *Id.* at 376. He had also told Rebozo "at that time that the stock had been stolen or was missing from E.F. Hutton & Co." *Id.* Reversing a grant of summary judgment in favor of the newspaper, however, the Fifth Circuit faulted the paper for resolving "the obvious ambiguity whether . . . [the investigator] told Rebozo the stock was (a) missing, (b) stolen, or (c) missing or stolen, in favor of the most potentially damaging alternative," concluding that it "creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness." *Id.* at 382.

A court applying the "*completely* fabricated" rule would have affirmed the grant of summary judgment. Indeed, while there was some ambiguity to the insurance investigator's testimony, the article provided the most plausible reading. Consistent with *Rebozo*, the Fifth Circuit would have reversed the grant of summary judgment in this case because Kristof did far more than interpret one ambiguous piece of evidence against Hatfill – he fabricated evidence and repeatedly stretched the truth to point to Hatfill.

Similarly, the Ninth Circuit's decision in *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992), contrasts with the "*completely* fabricated" approach and shows that the Ninth Circuit would have

resolved this case differently. In that case, Jerry Vann, a felon who testified for the government in organized crime prosecutions, alleged corruption on the part of the former head of the organized crime strike force in the U.S. Attorney's Office in Los Angeles, Richard Crane. Vann maintained that Crane, who had moved to private practice, had influenced the head of his old office, James Henderson, to dismiss strong cases against his organized crime clients. The allegations prompted a congressional investigation resulting in a letter to the Attorney General that "'strongly urged'" him "'to undertake a vigorous investigation.'" *Id.* at 1515.

After a reporter interviewed Vann, Crane, Henderson, and the Chief of Staff of the congressional committee, the newspaper published an article under the headline *U.S. Crime Strike Force in L.A. Accused of Corruption. Id.* at 1516. Crane and Henderson brought defamation actions and the district court dismissed Henderson's case on the ground that he could not show actual malice. The Ninth Circuit reversed because the article had "juxtaposed" the denials given by Crane and Henderson in a manner that suggested that one of them was lying. The article first recounted Crane's denial and said that Crane had talked to Henderson, who described Vann as a "kook." *Id.* at 1522, 1523. The next paragraph said that Henderson was not aware of the allegations and had not talked to Crane. *Id.* at 1522. The statements in both paragraphs were accurate – the apparent discrepancy resulted from the fact that the reporter had talked to Henderson *before* he talked to Crane, and the two had discussed

Vann's charges in the interim. *Id.* The Ninth Circuit held that "a reasonable jury could conclude that the juxtaposing of the denials was undertaken either knowingly or in reckless disregard of the false impression it would produce concerning Crane's and Henderson's own credibility." *Id.* at 1524.

The Fourth Circuit's approach forecloses that conclusion. The congressional committee that had investigated Vann's allegations had concluded that they were "credible and warranted a full investigation." *Id.* at 1515. In other words, the allegations in the article were anything but "*completely* fabricated." The evidence concerning the juxtaposition of the statements is a much weaker indication that the reporter had doubts about the truth of his assertion than exists here.

Finally, the Fourth Circuit's decision is inconsistent with the rule, adopted by many circuits, that "Plaintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met." *Tavoulareas v. The Washington Post Co.*, 817 F.2d 762, 794 n.43 (D.C. Cir. 1987) (en banc). The *complete* fabrication rule does not permit aggregate consideration of the evidence showing actual malice, but instead cuts off consideration if *some* evidence that was not fabricated supports the allegedly defamatory allegation. A treatise has recently described the "cumulative impact" question as "[o]ne of the most perplexing issues concerning proof of actual malice," concluded that "the case law is not completely free of ambiguity," and added that "this issue is frequently

crucial on appeal review." RODNEY A. SMOLLA, *LAW OF DEFAMATION* (2D ED., THOMSON/WEST 2008) (1986) §3:45 at 3-71, 3-72, and 3-72.1.

Review of the Fourth Circuit's decision in this case would permit the Court to decide whether Hatfill's evidence of actual malice should be considered individually or aggregated. More importantly, however, certiorari should be issued so that the Court may reject the *complete* fabrication rule and find that under a proper standard the evidence that the Fourth Circuit ignored should go to a jury to determine actual malice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730 1300
* *Counsel of Record*

October 2008

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Supreme Court, U.S.
FILED

No. 08-483 OCT 14 2008

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In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300
* *Counsel of Record*

October 2008

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN J. HATFILL, Plaintiff-Appellant
v.
THE NEW YORK TIMES COMPANY, Defendant-Appellee, and NICHOLAS KRISTOF, Defendant.

No. 07-1124, No. 07-1162

March 21, 2008, Argued
July 14, 2008, Decided

Before: NIEMEYER and MICHAEL, Circuit Judges, and BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge Niemeyer wrote the opinion, in which Judge Michael and Senior Judge Beam joined.

NIEMEYER, Circuit Judge

OPINION

In the days and weeks following the 9/11 attacks on the World Trade Center and the Pentagon, someone sent letters laced with the deadly toxin anthrax through the U.S. mails to members of Congress and news organizations, and five people

who handled the mail died from contact with the anthrax.

In the months that followed, Nicholas Kristof, a columnist whose articles appeared in the editorial section of *The New York Times*, criticized the FBI's investigation of the attacks as "lackadaisical" and "lethargic", "threaten[ing] America's national security," and, over a series of articles, Kristof began presenting evidence that pointed to Dr. Steven J. Hatfill, a biodefense research scientist, as a suspect. Even though Kristof acknowledged that by the time of his final article in August 2002, the FBI was improving, he demanded that the FBI either exculpate Dr. Hatfill or arrest him to "end this unseemly limbo."

Dr. Hatfill commenced this action against The New York Times Company, alleging that Kristof's columns were defamatory in that they "effectively" accused him of the crimes "in the mind of a reasonable reader." The district court granted The New York Times Company's motion for summary judgment, concluding that Dr. Hatfill was a "public official" or a "public figure" and that as a public official or public figure, he was required to demonstrate that The New York Times Company published the columns with "actual malice" in that it had knowledge that Kristof's columns were false or was reckless by disregarding whether they were false. Because Dr. Hatfill failed to demonstrate actual malice, the district court entered judgment for The New York Times Company.

On appeal, we affirm. Because Dr. Hatfill voluntarily thrust himself into the controversy surrounding the threat of bioterrorism and the

nation's lack of preparedness for a bioterrorism attack, we agree with the district court's finding that he was a "limited-purpose public figure" and therefore was required to show actual malice. And because Dr. Hatfill did not demonstrate actual malice, the district court properly entered judgment in favor of The New York Times Company. We also conclude that Dr. Hatfill did not present evidence sufficient to prove intentional infliction of emotional distress.[1]

I

On September 18, 2001, and again on October 9, 2001, someone, who has not yet been identified, sent letters laced with the deadly toxin anthrax through the U.S. mails to members of Congress and news organizations. Five people who handled the mail died from contact with the anthrax. In addition, Congress was forced to close and the U.S. Postal Service was severely disrupted.

In response to these anthrax attacks, reporters began to discuss the nation's vulnerability to bioterrorism and its unpreparedness for a bioterrorist attack. They also began to criticize the slow investigation being conducted by the FBI into the attacks. Nicholas Kristof, a regular columnist in

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[1] The New York Times Company filed a conditional cross-appeal ("if . . . the judgment is reversed") from the district court's orders requiring it to disclose its confidential sources. Because we affirm the district court's summary judgment in favor of The New York Times Company on the merits, we do not reach the question of whether the district court acted contrary to law when it ordered The New York Times Company to disclose the identities of its confidential sources.

the editorial section of *The New York Times*, was one such writer.

In a series of five columns appearing in *The New York Times* from May 2002 to August 2002, which are fully described in our earlier opinion, *Hatfill v. N.Y. Times Co.*, 416 F.3d 320, 325-28 (4th Cir. 2005), Kristof used information provided by experts and other sources to profile a suspect in the attacks, ultimately focusing on Dr. Steven J. Hatfill, a biodefense research scientist. With each publication, Kristof identified new evidence suggesting Dr. Hatfill as a prime suspect. The columns noted that Dr. Hatfill had access to anthrax, had knowledge of how to make it, and had a motive. In the same columns, Kristof criticized the FBI for not investigating the facts against Dr. Hatfill. He characterized its investigation as "lackadaisical" and "unbelievably lethargic" and admonished that the FBI's investigatory attitude "continues to threaten America's national security." By August 13, 2002, however, when Kristof wrote his last column on this issue, he observed that the FBI had appreciably intensified its investigation, leading Kristof to conclude, "there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him."

Dr. Hatfill commenced this action against The New York Times Company ("The New York Times" or "The Times"), alleging claims under Virginia law for defamation, defamation per se, and intentional infliction of emotional distress. In Count I of his complaint, he alleged that The New York Times' "false and reckless public identification of Dr. Hatfill with the anthrax mailings, both directly and by

implication from the manner in which his personal and professional background were presented in [Kristof's] columns, constituted a false factual allegation of terrorist and homicidal activity and impugned Dr. Hatfill's good name as a citizen, a physician and a bio-medical researcher to a reasonable reader." Count II alleged that each of eleven discrete factual misstatements in the five columns "constituted defamation per se, that, in the mind of the reasonable reader, would tend to incriminate Dr. Hatfill in the anthrax mailings." Finally, Count III alleged that "Kristof's intentional public identification of Dr. Hatfill with the anthrax murders" constituted intentional infliction of emotional distress.

The district court originally granted The New York Times' motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), concluding that the complaint did not state a claim on which relief could be granted. On appeal, we reversed, finding that Kristof's columns were capable of defamatory meaning under Virginia law and that if defamatory, they could be sufficiently outrageous to rise to the level necessary for a finding of intentional infliction of emotional distress under Virginia law. *Hatfill*, 416 F.3d at 332-37.

During discovery after remand, Dr. Hatfill moved to compel The New York Times to disclose the identity of five confidential sources from whom Kristof allegedly obtained some of the information for his columns, and the district court granted the motion, after three of the sources had voluntarily revealed their identities. But The New York Times still refused to disclose the two unrevealed sources,

and the district court sanctioned The Times. The court ordered that The Times could not refer to, rely on, or enter into evidence any information from those unrevealed sources.

Following the completion of discovery, the district court granted The New York Times' motion for summary judgment, concluding (1) that Dr. Hatfill was a "public official" and therefore had to demonstrate that The New York Times published the columns with "actual malice" -- i.e., that The Times had knowledge that the columns were false or published them with reckless disregard of whether they were false; (2) that Dr. Hatfill was also a "limited purpose public figure" and therefore again had to show "actual malice"; and (3) that Dr. Hatfill had not shown that The New York Times' columns were published with knowledge that they were false or with reckless disregard of whether they were false. For similar reasons, the court also concluded that Dr. Hatfill could not succeed on his claim for intentional infliction of emotional distress.

From the district court's judgment in favor of The New York Times, dated January 30, 2007, Dr. Hatfill appeals, contending (1) that he is neither a public official nor a public figure; (2) that the evidence in any event demonstrates actual malice; (3) that the evidence Dr. Hatfill advanced was sufficient to support his claim for intentional infliction of emotional distress; and (4) that the district court erred in granting summary judgment despite The Times' refusal to disclose Kristof's sources.

II

We do not, on this appeal, address whether Dr. Hatfill presented evidence sufficient to prove his defamation claims under Virginia law. Rather, we address the dispositive issue of whether Dr. Hatfill was a "public official" or "public figure," requiring him to prove that The New York Times acted with "actual malice" in publishing the Kristof columns.

A

As an accommodation to the *First Amendment's* protections of free speech and press, the Supreme Court has held that "public officials" and "public figures" must prove, as part of a defamation case, that the defendant's allegedly defamatory statement was made with "actual malice," meaning that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (as to a "public official"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in the result) (as to a "public figure"); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-37, 342-43 (1974); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994). Under this standard, it is not enough for a plaintiff to prove simply that the defendant failed to investigate or to check the accuracy of a false statement. *Gertz*, 418 U.S. at 332, 334-35 n.6. The standard requires that the defendant have a "subjective awareness of probable falsity" of the publication. *Id.* at 335 n.6 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). In addition, the element of "actual malice" must be proved by clear and convincing evidence. *Gertz*, 418 U.S. at 342; *Foretich*, 37 F.3d at 1551.

This compromise that limits a State's interest in preventing and redressing injuries to individuals' reputations in favor of society's interest in uninhibited, robust, and wide-open debate on public issues recognizes that public officials and public figures[2] have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Gertz*, 418 U.S. at 344 (footnote omitted). In addition, because public officials and public figures have generally chosen to

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[2] A *public official* is one who has a *governmental role* and whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). Such interest must go "beyond the general public interest in the qualifications and performance of all government employees." *Id.* "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz*, 418 U.S. at 344. For a public official, "society's interest . . . is not strictly limited to the formal discharge of official duties," but "extends to 'anything which might touch on an official's fitness for office,'" *id.* at 344-45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), and the Supreme Court has noted that "[f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison*, 379 U.S. at 77. A *public figure*, on the other hand, need not hold an important governmental office or serve an important governmental role. Public figures are persons who "have assumed roles of especial prominence in the affairs of society." *Gertz*, 418 U.S. at 345.

enter the public arena, they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Id.* at 345.

Notwithstanding these generalities, the Supreme Court has subdivided the class of public figures for determining when public figures are subject to the actual malice standard. In *Gertz*, the Court explained that some public figures have assumed roles "of such persuasive power and influence that they are deemed public figures *for all purposes.*" 418 U.S. at 345 (emphasis added). But more commonly, those who may be classed as public figures "have thrust themselves to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," and they are public figures *for only those limited purposes. Id.* (emphasis added). As the Court summarized:

> [The] designation [that one is a public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure *for all purposes and in all contexts.* More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure *for a limited range of issues.*

Id. at 351 (emphasis added); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979); *Wolston v.*

Reader's Digest Ass'n., Inc., 443 U.S. 157, 164-68 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976). Accordingly, we have stated that a public figure may be either (1) an "all-purpose public figure[ ]," who achieves "such pervasive fame or notoriety" that he becomes a public figure "for all purposes and in all contexts" or (2) a "limited-purpose public figure[ ]," who voluntarily injects himself "into a particular public controversy" and thereby becomes a public figure "for a limited range of issues." *Foretich*, 37 F.3d at 1551-52; *see also Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999).[3]

Accordingly, in contrast to a public official or an all-purpose public figure, either of whom must always meet the actual malice standard, a "limited-purpose public figure," one who has "thrust [himself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345 (emphasis added), must show actual malice only when alleging defamation with regard to the particular controversy into which he has inserted himself.

The reasons for narrowing the protections of state defamation law for limited-purpose public figures give rise to factors that we have articulated for determining whether a plaintiff in a defamation case is a private person entitled to the full protection of

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[3] *Gertz* and *Foretich* also suggested that an additional type of public figure might be an "involuntary" public figure, one who obtains public figure status "through no purposeful action of his own." *Gertz*, 418 U.S. at 345; *Foretich*, 37 F.3d at 1551. But, as *Gertz* observed, the instances of classifying a person as an involuntary public figure would be "exceedingly rare." *Gertz*, 418 U.S. at 345.

state defamation law or a limited-purpose public figure entitled to only a narrowed protection. Under these factors, we focus on whether:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

Foretich, 37 F.3d at 1553; *see also Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708-11 (4th Cir. 1991) (en banc); *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982).

B

We now assess whether Dr. Hatfill was indeed a limited-purpose public figure, as the district court concluded.[4]

The record shows the following about Dr. Hatfill. After he graduated from medical school in Rhodesia

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[4] In addition to finding Dr. Hatfill to be a limited-purpose public figure, the district court held that he could alternatively qualify as both a public official and an involuntary public figure. We do not review these conclusions, however, as we rest our holding only on our finding that Dr. Hatfill was a limited-purpose public figure.

(now Zimbabwe) and obtained a Master's degree in pathology in South Africa, he practiced medicine in South Africa. From South Africa, he returned to the United States where, in 1996, he received a research fellowship from the National Institutes of Health ("NIH") to study infectious diseases. At the NIH he became a respected figure within the U.S. bioterrorism community, giving public lectures and becoming involved in preparedness training for bioterrorist attacks.

At the conclusion of his NIH fellowship, Dr. Hatfill obtained a fellowship from the National Research Council, a private organization, to study infectious diseases, particularly the Ebola virus, at the U.S. Army Medical Research Institute for Infectious Diseases at Ft. Detrick, Maryland. While at Ft. Detrick, Dr. Hatfill was given security clearance to work with Biosafety Level 3 pathogens, which include anthrax, plague, and monkeypox, and was vaccinated against anthrax. He was one of about 100 persons who had access to "wet" anthrax spores, which were kept in an unlocked closet at the site, but his official work at Ft. Detrick did not include working with anthrax.

During the course of his work at Ft. Detrick, Dr. Hatfill provided briefings to government officials and taught the military, intelligence, and law enforcement communities about biological weapons and preparedness for bioterrorist attacks. He was an instructor for both the CIA's Chemical and Biological Weapons Proliferation Course and the Defense Intelligence Agency's Joint Military Attache School. He briefed officials at the CIA, the Office of the Secretary of Defense, and the State Department

about bioterrorism, and spoke about it at a conference sponsored by the Army War College. He also briefed, among others, the FBI's Joint Terrorism Task Force, the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, and the National Security Council. In this vein, he wrote a paper describing how the military could address bioterrorism, which he gave to the Commander at Ft. Detrick and the Special Operations/Low Intensity Conflict Officer at the Pentagon.

Dr. Hatfill also gave public speeches during this same period. For example, he gave a lecture at the Council on Foreign Relations on biological terrorism and made a presentation attended by the press on "Emerging Threats of Biological Terrorism." He also attended the Department of Defense's Worldwide Conference on Antiterrorism where, alongside other prominent bioterrorism experts, he spoke about biological weapons.

While at the NIH and Ft. Detrick, Dr. Hatfill acknowledged that "[t]he more I learned about biological warfare, the more alarmed I became about this potential threat," particularly in the context of "[s]everal anthrax hoaxes [that] had by then been described in the media." Accordingly, during this time, he increased his efforts to publicize the threat from bioterrorism and became known in the scientific community for his warnings that the United States was unprepared for an attack. Colleagues described him as "a strong believer that there was a need to prepare against bioterrorism," and noted that "he was a kind of whistle blower of sorts in government on the issue."

When his fellowship for work at Ft. Detrick ended in January 1999, Dr. Hatfill took a job as Director of Biological Security Programs with Science Applications International Corporation ("SAIC"), another private company, but one receiving nearly 90% of its revenue from government-contracted work. While at SAIC, Dr..Hatfill developed a special biological warfare defense curriculum for the State Department; he upgraded course materials for the CIA; and he served as an expert or consultant on various government projects. He designed and gave classified lectures on biological weapons production to the CIA, the Defense Intelligence Agency, and Special Operations units of the armed forces. He also attended a classified lecture which described the process for producing powdered anthrax and on at least one occasion delivered a lecture himself on weaponizing anthrax.

After the September 11, 2001 attacks on the World Trade Center and the Pentagon, Dr. Hatfill led the SAIC team preparing recommendations for securing U.S. ports and harbors against biological threats, and went to work on other security-related government contracts. His supervisors at SAIC described him as "a national subject matter expert, whose opinions and technical advice [were] widely sought" in the area of bioterrorism, and noted that Dr. Hatfill had "an extensive network of contacts within the Department of Defense, the special operations community, and the Central Intelligence Agency."

In addition to the reputation he developed in carrying out his jobs, Dr. Hatfill spread his message through the media. In September 1999, Dr. Hatfill

co-authored an article in the journal *Surgical Services Management* entitled "Answering the Chemical and Biological Warfare Threat," which urged the public health community to step up efforts to prepare for a chemical or biological attack. And in 2001, he submitted an article to his college alumni magazine, describing his career and identifying himself as "a specialist in biological warfare and its defense." The article included a photograph of him in a biosafety suit. He also wrote or called the media to volunteer his message on bioterrorism. For instance, following an anthrax scare at the B'nai B'rith headquarters in Washington, D.C., he called Armstrong Williams, a syndicated columnist, to offer "thoughts . . . on it." In April 1997, following a seminar on "Super Terrorism," he wrote a panelist, "I am tremendously interested in becoming more involved in this area and would like to volunteer my background, expertise and time, for whatever use these might be to the Terrorism Studies Program." Dr. Hatfill succeeded in appearing in news publications, magazines, books, and on television and radio programs on numerous occasions. He posed for a picture demonstrating how a determined terrorist could create biological weapons by "cooking up" plague in his own kitchen. The picture appeared in *Insight* magazine, and a commentary on the demonstration also appeared in *Quebec Science* magazine, in an editorial questioning Canada's preparedness for bioterrorist attacks. In addition, *Insight* magazine printed an article discussing the possibility of an anthrax attack at an airport, which included an interview with Dr. Hatfill, referring to him as a specialist in bioterrorism management. In 1996, Dr. Hatfill appeared on "Capital Ideas" with

Rob Armstrong, a CBS News Radio program, to discuss topics related to his research, and in August 1999, he provided an interview to *The Washington Times* on the subject of bioterrorism and the threat of weaponized anthrax, noting that, in his opinion, the United States was unprepared for such an attack.

Following the anthrax attacks in the fall of 2001, Dr. Hatfill continued to appear publicly in the discussion of bioterrorism and the anthrax attacks. On October 1, 2001, four days before the first anthrax victim died, *The Washington Times* republished a 1997 article on bioterrorism featuring Dr. Hatfill, which included his observations about the release of anthrax in public buildings. He told ABC News that it was difficult to make anthrax and stressed that he thought the attacks were probably the work of international terrorists, even though he had earlier told a colleague that he could make dry powdered anthrax like that used in the attacks without access to a lab "because I know what I'm doing." During this period Dr. Hatfill sent a letter to three doctors discussing the characteristics of the mailed anthrax and describing his expertise regarding the use of anthrax as a biological weapon. And in February 2001, he was interviewed by a journalist with *The Baltimore Sun*, which quoted him (although not by name) as saying that although he was one of "a bunch of people on [an FBI] list" of suspects based on a "profile" of the suspected anthrax mailer, he was "one of the good guys."

Apart from his voluntary efforts, the FBI investigation into the anthrax attacks drew wide attention to Dr. Hatfill. An FBI search of Dr. Hatfill's

apartment was televised live and attracted extensive media coverage, and after Dr. Hatfill's home was searched, news agencies began printing stories about him. Dr. Hatfill characterized the press coverage that followed the search as a "media frenzy."

As the investigation continued, so did the media coverage increase. A friend described Dr. Hatfill to Wolf Blitzer in an interview on CNN as "kind of a whistle blower of sorts in government on the issue [of bioterrorism]. A lot of people didn't like what he was saying because it was uncomfortable, but he was trying to focus attention on the issue in a positive and constructive way." *Newsweek* magazine reported that bloodhounds exposed to scent packets preserved from the anthrax envelopes had reacted strongly to Dr. Hatfill's home, his girlfriend's home, his ex-girlfriend's home, and restaurants he had recently visited. During this time, Dr. Hatfill also had numerous voluntary meetings and contacts with reporters. He had dinner with Judith Miller of *The New York Times*, lunch with Tom Connolly and Ted Koppel of ABC News, and lunch with Jim Stewart and Mark Katov of CBS News. He also made formal public statements on the case and attended meetings with other journalists from *The Washington Post*, National Public Radio, *The Los Angeles Times*, NBC News, United Press International, and *The Washington Times*.

During these same months following the anthrax attacks, several media outlets (other than *The New York Times*) identified Dr. Hatfill by name as a prime suspect in the anthrax attacks. Only after other media so identified him did Kristof refer to him by name in his columns.

C

To determine whether Dr. Hatfill "thrust [himself] to the forefront" of the relevant controversy "to influence the resolution of the issues involved," *see Gertz*, 418 U.S. at 345 (defining a limited-purpose public figure), we now turn to the five factors we identified for making the limited-purpose-public-figure determination, *see Foretich*, 37 F.3d at 1553.

First, on whether Dr. Hatfill had "access to channels of effective communication," it becomes readily apparent from the record that Dr. Hatfill was viewed as an expert on the topics of bioterrorism and biological weapons, including anthrax, and that he could command attention in this field. He was a frequent instructor of government agencies and personnel, had frequent meetings with journalists on the subject, and appeared on television, radio, and in print, both before and after the anthrax attacks occurred. Indeed, he was able, through two press conferences he convened, to refute "facts" written about him and to deny his involvement in the anthrax attacks. His access to channels of communication substantially exceeded those that we held sufficient in *Reuber*. In *Reuber*, we found that the plaintiff had testified before Congress and the Environmental Protection Agency; had given lectures on subjects related to the allegedly defamatory articles in which he was mentioned; had provided interviews to a newspaper; and had published several relevant scientific papers. *Reuber*, 925 F.2d at 708-09. If Reuber's access to channels of communication was sufficient, so too is Dr. Hatfill's.

The second and third factors -- which, in *Reuber*, 925 F.2d at 709, we combined to inquire "'whether

the plaintiff [had] voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy"' -- represent the "heart of our five-factor test," *Carr*, 259 F.3d at 280 (quoting *Reuber*, 925 F.2d at 709). To determine whether these combined factors are satisfied, we first address the nature of the "particular public controversy" that gave rise to the alleged defamation to determine whether Dr. Hatfill thrust himself into *that* controversy. *See Gertz*, 418 U.S. at 345; *Foretich*, 37 F.3d at 1553-54.

Dr. Hatfill argues that we should interpret the words "particular public controversy" narrowly and therefore that the relevant public controversy is "who committed the anthrax attacks in 2001." With this limited definition of public controversy, he argues that he did not "voluntarily assume a role of special prominence," even if he had previously been vocal about bioterrorism. The New York Times, by contrast, argues that we have previously interpreted "particular public controversy" more broadly, explaining that the "use of the word 'particular' signifies only that a court must identify the specific or 'particular' controversy or controversies fairly addressed by the publication at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified." The New York Times believes the particular public controversy in this case to be the debate on the threat from bioterrorism and the nation's lack of preparation for it, rather than the relatively narrow example of that threat exemplified by the specific anthrax mailings in 2001.

We agree with the view suggested by The New York Times. In light of the purpose of the public figure doctrine to encourage robust and uninhibited commentary on public issues, it stands to reason that we should look to the scope of the message conveyed in *The New York Times* through the articles that Dr. Hatfill is challenging. A fair reading of Kristof's columns reveals a debate about national security, the nation's lack of preparedness for bioterrorism, and the example provided by the FBI's investigation of the anthrax attacks in light of the evidence appearing against Dr. Hatfill. And, as Kristof stated in one of the early columns, the FBI's "lackadaisical attitude in pursuing the anthrax killer continues *to threaten America's national security.*" (Emphasis added). As the FBI investigation continued to show FBI lethargy, Kristof said in a later column that "there are two larger issues." He pointed first to the FBI's slowness in carrying out the investigation and second to "the need for much greater care within the U.S. biodefense program." Finally, focusing on Dr. Hatfill as a recognized expert as well as a potential suspect, Kristof quoted Dr. Hatfill's response to an *earlier* anthrax scare in Washington, D.C., when Dr. Hatfill had stated, "As was evidenced in downtown Washington, D.C., a few hours later [after the false anthrax letters were received at the B'nai B'rith headquarters], this topic [bioterrorism] is vital to the security of the United States. I am tremendously interested in becoming more involved in this area." Kristof observed that Dr. Hatfill used the earlier incident "to underscore the importance of his field and his own status within it."

Thus, while focusing on solving the anthrax mailings of 2001, which prompted the larger debate,

Kristof was, above all, concerned about the government's efforts to protect the nation from a bioterrorist attack.

The discussion of a particularized threat within the context of a larger debate in this case is strikingly similar to the circumstances defining the "particular controversy" in *Fitzgerald v. Penthouse International, Ltd.* ("*Fitzgerald II*"), 691 F.2d 666 (4th Cir. 1982), which concerned the plaintiff's defamation action arising out of publication of an article on the military use of dolphins. Fitzgerald, the plaintiff and a self-proclaimed expert on the use of dolphins for military purposes, alleged that an article in *Penthouse* magazine was defamatory when it suggested that he may have disclosed "top secret" information related to the military use of dolphins to other countries. *Fitzgerald v. Penthouse Int'l, Ltd.* ("*Fitzgerald I*"), 639 F.2d 1076, 1079 (4th Cir. 1981). In *Fitzgerald II*, we held that, although the allegedly defamatory statements were the suggestions that Fitzgerald had disclosed secret information and that he had been involved in espionage by offering to sell dolphin torpedoes to other countries, the "particular public controversy" within which to analyze his status as a public figure was the larger controversy surrounding the military's use of dolphins, not the specific and narrow question of *who had leaked the information*. *See Fitzgerald II*, 691 F.2d at 668-69. Indeed, the situation in *Fitzgerald* -- where an expert in a field claims defamation when a news publication later suggests he might have committed a crime relevant to that field -- is almost identical to the circumstance in this case. Thus, just as we identified the particular public controversy in *Fitzgerald II*, we conclude in this case that the particular public

controversy is the threat from bioterrorism and the nation's preparedness to handle that threat, with the anthrax attacks as the specific example that opened the debate to greater discussion.

It follows from the nature of the particular controversy that Dr. Hatfill "voluntarily assumed a role of special prominence" in the controversy. And he did so in an attempt "to influence the resolution of the controversy." *Reuber*, 925 F.2d at 709. Throughout his career, Dr. Hatfill was not only repeatedly sought out as an expert on bioterrorism, but was also a vocal critic of the government's unpreparedness for a bioterrorist attack, as evidenced by the topics of his lectures, writings, participation on panels, and interviews. Through these media, Dr. Hatfill voluntarily thrust himself into the debate. He cannot remove himself now to assume a favorable litigation posture.

The last two factors are also indisputably satisfied in this case. The particular public controversy surely existed prior to the publication of the allegedly defamatory statements. The controversy over the nation's preparedness for bioterrorist attack existed years before *The New York Times* published Kristof's columns, and it was this very topic on which Dr. Hatfill centered his entire career. In addition, the controversy heightened with the investigation into the anthrax attacks themselves, which began in the fall of 2001, more than six months before Kristof's columns appeared, and Dr. Hatfill himself used the attacks as a platform from which to intensify his message about national unpreparedness, thus satisfying the final requirement -- that he "retained public-figure status

at the time of the alleged defamation." *Foretich*, 37 F.3d at 1553.

We therefore conclude that Dr. Hatfill meets the criteria for classification as a public figure for the limited purpose of the controversy regarding the bioterrorism threat and the nation's preparedness for a bioterrorist attack, with the anthrax attacks as but an example of that controversy.

III

As a limited-purpose public figure, Dr. Hatfill had to show, in order to prevail on his defamation claim, that The New York Times acted with actual malice in publishing the challenged columns, meaning that the alleged defamatory statements had to be made with knowledge that they were false or with reckless disregard of their falsity, *i.e.*, with a "high degree of awareness of [their] probable falsity." *Reuber*, 925 F.2d at 714 (quoting *Garrison*, 379 U.S. at 74). Moreover, he had to "forecast evidence sufficient to prove actual malice by *clear and convincing* evidence." *Carr*, 259 F.3d at 282 (emphasis added). Dr. Hatfill did not make that showing.

In both counts for defamation, Dr. Hatfill asserted that Kristof's columns, as well as isolated statements within them, conveyed a specific defamatory meaning -- the strong suggestion that Dr. Hatfill was the anthrax mailer and therefore that he was a terrorist who committed murder. Therefore, to show actual malice Dr. Hatfill had to show by clear and convincing evidence that Kristof either knew of the falsity of this suggestion, i.e., he knew Dr. Hatfill did not commit the anthrax mailings, or that Kristof had a "high degree of awareness" of its

probable falsity, again that Dr. Hatfill did not commit the anthrax mailings. From our careful review of the record, we conclude that Dr. Hatfill did not satisfy this burden.

Indeed, the record contains substantial evidence to support The New York Times' contention that Kristof *actually believed* that Dr. Hatfill was the prime suspect. At the time that Kristof wrote his columns, he knew from several sources that Dr. Hatfill fit the profile that the FBI had developed and that he had been identified specifically by the FBI as a suspect who should be investigated carefully. In conducting research for his columns, Kristof had reviewed many previously published articles about Dr. Hatfill, which recounted that he had been questioned by the FBI more than once; that he had voluntarily vaccinated himself against anthrax shortly before the mailings; that he had access to labs where anthrax was stored; that he had knowledge about anthrax's use as a weapon; that he had strong views about the bioterrorism threat; that he had agreed that his "background naturally drew the FBI's attention"; that he had spoken frequently about possible bioterrorism; and that he lost his security clearance after he failed a polygraph test shortly before the mailings. In addition, Kristof reviewed numerous documents, including Dr. Hatfill's resume and various reports, papers, and letters written by him describing his knowledge of bioterrorism and biological weapons.

With these undisputed facts, no reasonable jury could find that Kristof had a "high degree of awareness" that Dr. Hatfill was *not* the anthrax mailer. *Garrison*, 379 U.S. at 74. As the district court

found, the evidence in this case "*at best*" reveals that Kristof "did not know whether or not [Dr. Hatfill] was the anthrax mailer, but did believe that [Dr. Hatfill] was someone that [the] FBI should investigate more thoroughly." (Emphasis added).

Dr. Hatfill contends that because Kristof was warned that one of his main sources, Dr. Barbara Rosenberg, was untrustworthy, and yet still published his columns, we should find actual malice. But Dr. Rosenberg was considered an expert in the field of biological weapons and had been called upon by the FBI to discuss the anthrax investigation. Given Dr. Rosenberg's background, there is no reason that Kristof's reliance on her statements constitutes actual malice, even given the expressed disagreement of others with regard to her opinions. Constitutional malice requires "much more than a failure to exercise ordinary care" -- it demands evidence of the "publication of a *completely* fabricated story, or of one based entirely on an unverified anonymous telephone call; or publication where there are obvious reasons to doubt the veracity of the informant." *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980) (emphasis added) (citing *St. Amant*, 390 U.S. at 732). Such was not the case here. We agree with the district court's conclusion that "based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that [Dr. Hatfill] could have been the anthrax mailer."

The allegations in Count II, listing discrete statements alleged to be false, do not improve Dr. Hatfill's arguments, because at bottom, Dr. Hatfill still maintains that the discrete false statements in the columns constituted defamation because they

"*tend[ed] to incriminate Dr. Hatfill in the anthrax mailings.*" (Emphasis added). This is the same defamatory message allegedly conveyed by the columns as a whole, as alleged in Count I.

Accordingly, we affirm the district court's judgments on Counts I and II.

IV

Dr. Hatfill also contends that the district court erred in granting summary judgment on his claim for intentional infliction of emotional distress.

Under Virginia law, to recover for intentional infliction of emotional distress, Dr. Hatfill had to prove that (1) "the wrongdoer's conduct was intentional or reckless"; (2) "the conduct was outrageous and intolerable"; (3) "there was a causal connection between the wrongdoer's conduct and the emotional distress"; and (4) "the emotional distress was severe." *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). When we had this case on the first appeal and reinstated Dr. Hatfill's claim for intentional infliction of emotional distress, we recognized that "if Dr. Hatfill "ultimately [could not] prevail on his defamation claims because he [was] unable to satisfy [the] constitutional requirements for recovery, then he likely [would] be unable to prove that The Times' misconduct was intentional or reckless or that such misconduct was sufficiently outrageous to warrant recovery" for intentional infliction of emotional distress. *Hatfill*, 416 F.3d at 336-37.

On remand, the district court concluded that because Dr. Hatfill "failed to satisfy his burden of showing" that The New York Times "act[ed] with

malice when it published Kristof's columns," he also had failed to produce enough evidence to be able to convince a reasonable jury that The New York Times had either "intentionally or recklessly caused him severe emotional distress" or that its conduct was otherwise "sufficiently outrageous" to support liability for intentional infliction of emotional distress. We agree and affirm the district court's conclusion.

V

Finally, as an overarching claim, Dr. Hatfill contends that the district court erred in granting summary judgment to The New York Times in light of The Times' refusal to comply with the district court's order that it disclose its sources. We find the argument unpersuasive.

Dr. Hatfill's argument is based on a non sequitur. Simply because The New York Times refused to comply with the district court's order that it disclose its sources does not mean that The Times was precluded an award of summary judgment. The district court, in its discretion, sanctioned The Times for refusing to comply with the order, precluding it from referring to, relying on, or entering into evidence the existence of the two confidential sources that were not disclosed or the information they provided to Kristof. Dr. Hatfill does not suggest that The New York Times' motion for summary judgment violated that sanction.

Thus, Dr. Hatfill can only be challenging the adequacy of the sanction itself. But the district court exercised its discretion to impose a penalty that would "ameliorate [the] prejudice" to Dr. Hatfill

"without resorting to overly drastic measures given the nature of this case," and therefore restricted The Times' ability to refer to the sources for evidence. We conclude that the sanction imposed by the district court did not amount to an abuse of discretion, and therefore we reject Dr. Hatfill's argument. *See Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003) (noting standard of review).

The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEVEN J. HATFILL, Plaintiff-Appellant
v.
THE NEW YORK TIMES COMPANY, Defendant-Appellee, and NICHOLAS KRISTOF, Defendant.

No. 07-1124

August 11, 2008, Filed

AMERICAN BROADCASTING COMPANIES, INCORPORATED; ALM MEDIA, INCORPORATED; THE ASSOCIATED PRESS; BLOOMBERG L.P.; CBS BROADCASTING, INCORPORATED; COX ENTERPRISES, INCORPORATED; DOW JONES & COMPANY, INCORPORATED; GANNETT COMPANY, INCORPORATED; HEARST CORPORATION; LANDMARK COMMUNICATIONS, INCORPORATED; AGAZINE PUBLISHERS OF AMERICA, INCORPORATED; NBC UNIVERSAL, INCORPORATED; NEWSPAPER ASSOCIATION OF AMERICA; NEWSWEEK, INCORPORATED; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; TIME,

INCORPORATED; THE WASHINGTON POST COMPANY

Amici Supporting Appellee

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 04-0807

January 30, 2007, Decided
January 30, 2007, Filed

Before: Claude M. HILTON, United States District Judge.

Claude M. HILTON, United States District Judge.

MEMORANDUM OPINION

This matter comes before the Court on Defendant's Motion for Summary Judgment. Plaintiff filed a three-count Complaint in this Court asserting causes of action for defamation and intentional infliction of emotional distress in connection with a series of columns authored by Nicholas Kristof that appeared on the Op-Ed pages of The New York Times. Count One for defamation alleges that the columns written by Nicholas Kristof and published by the New York Times falsely

implicate Plaintiff in the 2001 anthrax mailings that killed at least five individuals. Count Two, also for defamation. alleges that eleven discrete allegations within the columns tend to incriminate Plaintiff in the anthrax mailings. Count Three alleges intentional infliction of emotional distress on the ground that the public identification and implication of Plaintiff with the anthrax deaths was "unconscionable, malicious, intentional, and calculated to inflict grievous emotional distress on [Plaintiff]."

Plaintiff commenced this action on June 13, 2004. Defendant moved to dismiss all counts, and this Court granted dismissal on the ground that Plaintiff failed to state a claim upon which relief could be granted. On July 28, 2005, the Fourth Circuit reversed in substantial part this Court's decision, holding that Plaintiff had adequately pled the elements of all of his claims. Defendant's petition for a rehearing and rehearing *en banc* was denied, as was Defendant's petition to the United State Supreme Court for a writ of certiorari. The parties have now completed extensive discovery and the matter is again before this Court on Defendant's Motion for Summary Judgment.

The columns at issue, published during the summer of 2002, recount the failures of the Federal Bureau of Investigation (FBI) in its investigation of the anthrax mailings that occurred in the fall of 2001. In these columns, Mr. Kristof highlights specific mistakes made in the FBI's investigation. As an example of the FBI's shortcomings in the anthrax investigation, the columns focus in large part on the

FBI's failure to adequately investigate Plaintiff, Steven Hatfill.

Prior to the publication of Mr. Kristof's columns, Plaintiff established a reputation in the field of infectious disease and bioterrorism research. In 1996, the National Institutes of Health (NIH) awarded plaintiff a fellowship to work on a NASA program relating to human-tissue research and infectious disease. The next year, Plaintiff received a fellowship that authorized him to work at the United States Army Medical Research Institute for infectious diseases (USAMRIID). Plaintiff began work there in the fall of 1997 and remained there until 1999. While at USAMRIID, Plaintiff had security clearance to work with Biosafety Level 3 pathogens, including anthrax, plague, and monkeypox. Throughout his tenure at USAMRIID, Plaintiff provided briefings to government officials and to various military, intelligence, and law-enforcement agencies within the federal government on issues of biological weapons and the country's preparedness for an attack.

Dating as far back as 1996, Plaintiff took it upon himself to publicize the threat posed to the United States from biological weapons. While at NIH, Plaintiff posed for a picture demonstrating how a determined terrorist could create a biological weapon, such as the plague, in his own kitchen. Plaintiff's participation in this demonstration was noticed by *Quebec Science* magazine, and led an editor to question Canada's preparedness for a bioterrorist attack. In August 1997, Plaintiff provided an interview to a *Washington Times* columnist on the subject of bioterrorism, and

specifically the threat of anthrax being used as a weapon. During this interview, Plaintiff noted that the United States' health care system was ill prepared for such an attack.

In January 1998, Plaintiff provided an interview to *Insight* magazine about the risks of a biological attack and how an anthrax attack could be orchestrated. Also that year, Plaintiff offered his thoughts and expertise on nationally syndicated radio and television shows and discussed bioterrorism and the need for increased government vigilance. Plaintiff also drafted a novel, which he registered with United States Copyright office, describing a scenario in which a terrorist sickens government officials with a biological agent. The novel was never published.

Members of the scientific community within Plaintiff's area of expertise viewed Plaintiff as an expert in his field, and drew upon his expertise on several occasions. His co-workers and colleagues believed that he was very knowledgeable in the area of biological weapons and agents. While working at USAMRIID, Plaintiff gave an interview about his own background to Richard Preston for inclusion in his book, *The Hot Zone*. In 1998, Plaintiff sat on a panel alongside two of the country's leading experts in the production of dry anthrax addressing the subject of biological weapons. Plaintiff also held himself out as having a working knowledge of wet and dry biological weapons.

In January 1999, Plaintiff took a position with Science Applications International Corporation (SAIC), one of the nation's largest government contracting firms. At SAIC, Plaintiff served as a

lecturer for the State Department on the medical effects of chemical and biological agents. Plaintiff designed and gave classified lectures on biological weapon production to the CIA, the DIA, and special operations units of the armed forces. In addition, Plaintiff attended a classified lecture which described the process for producing powdered anthrax, and on at least one occasion, delivered a lecture on weaponizing anthrax. In September 1999, Plaintiff co-authored an article in the journal *Surgical Services Management* entitled "Answering the Chemical and Biological Warfare Threat," which urged the public health community to step up efforts prepare for a chemical or biological attack. Pursuant to a SAIC contract with the Joint Special Operations Command at Fort Bragg, Plaintiff supervised the creation of a simulated biological weapons laboratory inside an shipping container and trained forces how to recognize and destroy such containers. Government officials sought Plaintiff's advice on matters of national security and bioterrorism, and considered him an expert in biological weaponry.

In August of 2001, three weeks before the anthrax mailings, the Defense Security Service suspended Plaintiff's security clearance. As a result of this suspension, SAIC terminated Plaintiff in March of 2002. After leaving SAIC, Plaintiff took a position with Louisiana State University to work on a federally-funded program, a program which Plaintiff described as being one of national importance. The program dealt with biological weaponry and training of federal and state governments in the proper response to a bio-terror event.

In the fall of 2001, an unknown individual sent letters laced with anthrax to several news organizations and members of Congress. Following these attacks, Plaintiff spoke with a reporter for ABC News offering his opinion that the anthrax attacks were probably not of domestic origin. He also sent a letter to three doctors discussing the characteristics of the mailed anthrax and touting his expertise on anthrax as a biological weapon.

During the first few weeks of its investigation, the FBI identified Plaintiff as a person of interest. The FBI interviewed Plaintiff and conducted at least one polygraph examination. The FBI also conferred with Dr. Barbara Hatch Rosenberg, a Ph.D. molecular biologist at the State University of New York, meeting with her on several occasions to discuss the investigation and her profile of the anthrax mailer.

By early 2002, the media began to focus on Plaintiff, but did not identify him by name. In June 2002, the FBI searched Plaintiff's apartment. This search generated a significant amount of news coverage. The FBI also searched Plaintiff's car and a condominium owned by Plaintiff's girlfriend. The FBI seized several items in these searches, including notes regarding the anthrax mailings, a spinner flask of anthrax stimulant, and a container of Cipro.

In August 2002, LSU placed Plaintiff on administrative leave after the United States Department of Justice directed the University to cease using Plaintiff as an instructor and terminate government funding of his programs. That same month, Attorney General John Ashcroft identified Plaintiff on national television as a "person of

interest" in the anthrax investigation. Soon after, Plaintiff held press conferences to refute allegations that he was in any way involved with the attacks. On August 26, 2003, Plaintiff filed a lawsuit against Attorney General Ashcroft, the DOJ, the FBI and others, charging them with accusing Plaintiff without formally naming him as a suspect or charging him with any wrongdoing.

Nicholas Kristof is an Op-Ed columnist for Defendant, the New York Times. Beginning in the fall of 2001, Mr. Kristof undertook to stir public debate over national security and specifically, opined on how the anthrax investigation was proceeding. From January through August of 2002, Mr. Kristof wrote a series of six Op-Ed columns on the subject. Mr. Kristof's columns expressed his views that the FBI was not pursuing the investigation in an acceptable manner. He pointed out that the FBI's failure to investigate Plaintiff fully was an example of the Bureau's inadequacies. In each column, Mr. Kristof stressed Plaintiff's denial of wrongdoing, reported that Plaintiff's friends viewed him as a patriot, and urged the FBI to investigate Plaintiff more aggressively or exculpate him altogether.

All but the last column, which identified Plaintiff by name, referred to Plaintiff by the pseudonym "Mr. Z." Mr. Kristof identified Plaintiff by name only after Plaintiff had appeared in a press conference refuting allegations of his involvement in the anthrax mailings. Mr. Kristof contends that he used the pseudonym "Mr. Z" so as not to direct unwarranted attention to Plaintiff. In gathering information for his columns, Mr. Kristof researched a variety of news reports about Plaintiff and the investigation,

reviewed documents related to Plaintiff, and consulted with prominent scientists and friends and colleagues of Plaintiff.

The case before this Court centers on the aforementioned facts. Defendant now asks this Court to grant summary judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In reviewing a motion for summary judgment, courts view the facts in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party then has the burden of showing that a genuine dispute as to any material fact does exist. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere' existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 248. "Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In a defamation case, a plaintiff's burden of proof depends on the classification of the plaintiff as either a private figure, or a public figure or public official.

To recover compensatory damages for defamation, a public official or public figure must show actual malice while a private figure may recover with a lesser showing of culpability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1973); *see also Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1990). When the matter involved is a matter of public concern, either type of plaintiff must show malice by clear and convincing evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Therefore, this Court must first determine Plaintiff's status as a public or private figure.[1] A defamation plaintiff is a "public official" where his "position in government has such apparent importance that the public has an independent interest in qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966). Such interest must go beyond the "general public interest in the qualifications and performance of all government employees." *Id.* A defamation plaintiff that receives this designation receives less protection under defamation law because the interests in public discussion are particularly strong and outweigh society's interest in preventing attacks on reputation. *Id.* at 86.

In applying this standard, a court must consider whether the individual's position is "one which would

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[1] Whether a defamation plaintiff is a public official or public figure is an issue of law to be resolved by the court. *See Wells v. Liddy*, 186 F.3d 505, 531 (4th Cir. 1999). A court making this determination must "look through the eyes of a reasonable person at the facts taken as a whole." *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1551 (4th Cir. 1994) (citation omitted).

invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 86 n.13. For a plaintiff to be deemed a public official, he need not hold a formal government position. Rather, a plaintiff may be deemed a public official when he has, or appears to the public to have "substantial responsibility for or control over the government affairs." *Baumback v. American Broadcasting Co.*, No. 97-2316, 1998 U.S. App. LEXIS 18770, at *13-14 (4th Cir. Aug. 13, 1998) (noting that according to the plaintiff's curriculum vitae, the plaintiff "maintained the appearance that he wielded substantial control"). Thus, the designation of "public official" turns on whether the plaintiff had "substantial responsibility - actual or apparent - for administration of governmental matters." *Id.* at *8. In making this determination, courts examine whether the plaintiff "made [] recommendations, participated in [] policy determinations, and exercised [] discretion." *Id.* (quoting *Arctic Co. v. Loudoun Times Mirror*, 624 F.2d 518, 521-22 (4th Cir. 1980)).

In this case, Plaintiff qualifies as a public official both in fact and in appearance. Plaintiff left his formal government position when he went to work at SAIC. Nevertheless, he continued to perform governmental functions as a contractor with the government, sharing his expertise in the field of biological warfare, and as a participant at LSU in a government-funded program dealing with biological weaponry and training of other government officials and special forces. In the course of his work, Plaintiff regularly made recommendations to highly-ranked government officials with respect to biological

weaponry. Plaintiff also exercised discretion in developing training programs and protocols for the CIA, the DIA, the State Department, and certain elite branches of the armed services. At the time Mr. Kristof's columns appeared in print, Plaintiff was receiving federal funds to work on national defense programs that he himself described as being of "national importance."

Based on the above facts, this Court finds that Plaintiff qualifies as a public official for purposes of this defamation action. Plaintiff's participation in government training and decisionmaking placed him in a position of public trust. The public had an independent interest in Plaintiff's qualifications and performance given the highly sensitive nature of his work and its importance to national defense. His responsibilities and close connection with the federal government rendered him a public official.

Even if Plaintiff were not worthy of "public official" status, the Court finds that Plaintiff qualifies as a "public figure." There are two types of public figures relevant to this matter: a "limited purpose" public figure and an "involuntary" public figure. *See Gertz*, 418 U.S. at 345, 351 (identifying three distinct categories of "public figures"). A limited purpose public figure is a person who has pursued a course of conduct that "invite[s] attention and comment" and has "access to the channels of effective communication." *Id.* at 345. The Fourth Circuit adopted a five-factor test for determining whether a plaintiff is a public figure: (1) whether the plaintiff had access to the channels of effective communication; (2) whether the plaintiff voluntarily assumed a role of special prominence in a public

controversy by attempting to influence its outcome; (3) whether the plaintiff did in fact seek to influence the outcome; (4) whether the controversy existed prior to publication of the allegedly defamatory statements; and (5) whether the plaintiff retained public figure status at the time of the alleged defamation. *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (1982); *see also Reuber*, 925 F.2d 703; [*529] *Carr v. Forbes, Inc.*, 259 F.3d 273 (4th Cir. 2001).

In *Fitzgerald v. Penthouse Int'l, Ltd.*, the Court deemed the plaintiff a limited purpose public figure for purposes of a magazine article concerning the abuse of trained dolphins by the United States government. 691 F.2d at 668. Persuasive to the court was the fact that plaintiff had researched the military use of dolphin technology for the United States Navy, and had lectured and published several articles on the subject. *Id.* at 669. The Court also noted that the plaintiff had been interviewed on a television program and by a newspaper. The Court found there to be a pre-existing public controversy because the national press had covered the use of dolphins in Vietnam, and the subject had been addressed in the media. *Id.* The Court also found that the plaintiff had sought to influence the outcome of the controversy by lecturing and publishing on the topic. *Id.*

In *Reuber v. Food Chem. News, Inc.*, the Fourth Circuit accorded public figure status to a scientist who had performed research for the government on the pesticide, Malathion. 925 F.2d at 706-07. The plaintiff was the subject of an article about his involvement in a controversy surrounding the subject

matter of his research. The plaintiff was held to be a limited purpose public figure for purposes of an article on the health risks posed by Malathion. *Id.* The Court found that the plaintiff had significant access to channels of communication because he had testified before Congress and the Environmental Protection Agency, and had given lectures on the subject of health risks posed by the pesticide. *Id.* Additionally, the plaintiff had provided interviews to a newspaper, and had published several scientific papers on the subject. *Id.* His conduct, according to the Court, was sufficient to show that he had voluntarily assumed a role of special prominence in the controversy, and attempted to influence the controversy by challenging the government's conclusions regarding the controversy. *Id.* at 709-10.

Most recently, the Fourth Circuit announced in *Carr v. Forbes, Inc.*, that the "heart of the five-factor test is the second and third factors." 259 F.3d. at 280. Applying those factors, the Court found that "an engineer who develops privately funded public infrastructure projects" was a limited purpose public figure because his conduct when beyond simple government contracting. The plaintiff also invited public attention to himself and the contracts, making affirmative efforts to "engender public support" for specific public works projects, and seeking to achieve a level of "prominence in [his] professional field." *Id.* at 280-81 (citing *Reuber*, 925 F.2d at 709). *Id.*

Like the plaintiffs in *Fitzgerald*, *Reuber*, and *Carr*, Plaintiff satisfies the requirements for limited purpose public figure status. First, Plaintiff indeed had and still has access to numerous channels of communication, and in fact, had access to some of the

most well-known media outlets. For example, Plaintiff appeared as a guest-expert on CBS News Radio, and as recently as 2002, Plaintiff spoke with reporters for ABC News, *The New York Times*, and *The Baltimore Sun* about the investigation of the anthrax mailings. Plaintiff also published an article in a scientific journal on the threat of bioterrorism. Based upon these facts, it appears that Plaintiff had ready access to members of various news media.

As to the second and third factors, Plaintiff was a vocal critic of the government's level of preparedness for a bioterrorist attack. His lectures, writings, participation on panels, and interviews, as well as his own resume, led many to consider Plaintiff an expert in the field of biological weaponry. This is supported by testimony from those in the scientific community, as well as the fact of his retention by various government agencies. Based on this conduct, the Court can rightly conclude that Plaintiff voluntarily assumed a role of special prominence in the public debate over the nation's preparedness for a biological attack, and indeed sought to influence government policy.

Fourth, the controversy into which Plaintiff thrust himself can be properly defined as the government's handling of the bioterrorism threat, and more specifically, its handling of the anthrax investigation. All of the columns at issue expressly addressed the efficacy of the federal government's efforts to protect the nation from a bioterrorist attack. The controversy over the nation's preparedness for a bioterrorist attack existed years before the Times published Kristof's articles. The controversy over the FBI's handling of the anthrax

investigation began in the fall of 2001, also before the Times published any of the columns in question. Indeed, Plaintiff was publicly identified as a potential suspect by the press on several occasions before the first column at issue was ever published.

Finally, Plaintiff was a public figure at the time the allegedly defamatory columns were published. Plaintiff spoke with a reporter for ABC News on the subject of the anthrax mailings after the mailings occurred but before the Times published any of Mr. Kristof's columns.

Even if Plaintiff did not voluntarily inject himself into the public controversy surrounding bioterrorism, he still qualifies for public figure status. Even involuntary participants can be public figures when they choose a course of conduct which invites public attention. *See e.g.*, *Reuber*, 925 F.2d at 710. Plaintiff should have foreseen that by providing interviews, delivering lectures, and publishing articles on the subject of the bioterrorism threat, a public interest in him would arise. Because Plaintiff engaged in a course of conduct that was likely to invite attention and scrutiny, Plaintiff cannot now claim that he was a private figure who was dragged into this controversy unwillingly. This Court finds that Plaintiff is a public figure in the context of this particular controversy - the government's handling of the bioterrorism threat - covered by the columns at issue in this litigation.

As a public official and public figure, Plaintiff can only recover for defamation if he can show that Defendant acted with actual malice in publishing the columns at issue. *See Carr*, 259 F.3d at 282. Actual malice may be proven by showing that a defamatory

statement was made (1) with knowledge that it was false, or (2) with reckless disregard of its falsity, *i.e.*, a "high degree of awareness of its probable falsity." *Reuber*, 925 F.2d at 714 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Actual malice must be established by clear and convincing evidence. *Carr*, 259 F.3d at 283.

The Fourth Circuit comprehensively addressed the actual malice standard in *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980), and provided examples of what kind of evidence will satisfy the standard. The Fourth Circuit acknowledged that actual malice requires "much more than a mere failure to exercise ordinary care in verifying statements." *Id.* at 731-32. For example, the Fourth Circuit explained that evidence such as "publication of a completely fabricated story, or of one based on an unverified anonymous telephone call, or publication where there are obvious reasons to doubt the veracity of the informant" could make the requisite showing. *Id.* at 732. However, if the sources of the fodder for the defamatory statements appeared reliable and defendant did not seriously doubt the veracity of accuracy of the information, the actual malice standard would not be satisfied. *Id.* at 734; *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (stating that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing" and "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication").

To avoid summary judgment, Plaintiff must "forecast evidence sufficient to prove actual malice by clear and convincing evidence." *Carr*, 259 F.3d at 282. In this case, Defendant is entitled to summary judgment because there is no evidence to establish that Mr. Kristof knew of the falsity of his statements, or that he harbored a "high degree of awareness" of the probable falsity of his statements. The evidence in the record demonstrates that Mr. Kristof did not believe that any of his statements were false. Moreover, by the time he wrote the columns at issue, Mr. Kristof was aware that Plaintiff had been identified as a person of interest in the investigation and that a number of media outlets had published facts raising suspicion about Plaintiff's possible connection to the mailings. Mr. Kristof also knew that several profiles of the anthrax killer generated by the FBI and others in the scientific community matched Plaintiff closely. Mr. Kristof spoke with a number of scientific experts as well as Plaintiff's colleagues, many of whom agreed that Plaintiff ought to be investigated further. Moreover, Mr. Kristof personally reviewed hundreds of documents, including Plaintiff's own resume, that he believed confirmed Plaintiff's ability to make anthrax and Plaintiff's potential access to the type of anthrax used in the attacks.

Additionally, no evidence exists tending to show that Mr. Kristof had a high degree of awareness of the probable falsity of his columns. At best, the evidence reveals that, when Mr. Kristof published his columns, he did not know whether or not Plaintiff was the anthrax mailer, but did believe that Plaintiff was someone that FBI should investigate more thoroughly. Even if Mr. Kristof was not certain as to

the truth of the alleged implication of guilt, this would not be sufficient to support a finding that he was highly aware of its probable falsity.

Plaintiff contends that Mr. Kristof was warned that one of his main sources, Dr. Barbara Rosenberg, was not trustworthy. Plaintiff's attempt to paint Dr. Rosenberg as a conspiracy theorist with absolutely no credibility is contrary to the evidence on record. Dr. Rosenberg was considered an expert in the field of bioweaponry, and headed a working group for bioweapons for the Federation of American Scientists. She was called upon by the FBI to discuss the anthrax investigation, and briefed Senate members on the investigation. Given her background, Plaintiff has shown had no reason that Mr. Kristof should have doubted the veracity of Dr. Rosenberg as an informant, even if others expressed disagreement with her theories.

Based on all the information he had gathered, Mr. Kristof had no reason to seriously doubt that Plaintiff could have been the anthrax mailer. Therefore, Plaintiff cannot demonstrate that Defendant published the columns at issue with actual malice.

The second count of Plaintiff's complaint alleges that eleven "discrete false and reckless allegations" made in the columns constitute defamation because they tend to incriminate Plaintiff in the anthrax mailings. These allegations include the following: Plaintiff unquestionably had the ability to make first-rate anthrax; Plaintiff was one of several scientists who had "ability to access and motive to send anthrax"; Plaintiff had access to an "isolated residence" in the fall of 2001 and "gave Cipro to

people who visited" the residence; Plaintiff had anthrax vaccinations that were up to date; Plaintiff "failed 3 successive polygraph examinations"; Plaintiff was "upset with the United States Government for a period preceding the anthrax attack"; and Plaintiff had expertise in dry biological weapon agents.

In this Court's 2004 opinion dismissing this matter, this Court applied the reasoning adopted by the Second Circuit in *Herbert v. Lando*, 781 F.2d 298, 307-08, 312 (2d Cir. 1986), which held that a plaintiff's inability to carry his burden of proving defamation with respect to the implications of the publication as a whole precluded him from surviving summary judgment with respect to the specific statements when they imply the same defamatory meaning. *See Hatfill v. The New York Times Co.*, Civ. No. 1:04-807, 2004 U.S. Dist. LEXIS 27530 (Nov. 24, 2004). Under this "subsidiary meaning" doctrine, when a publication as a whole is not actionable for defamation, "other statements . . . should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312.

Applying the "subsidiary meaning doctrine," if the Court determines that Defendant is entitled to summary judgment with respect to the overall implication alleged in Count One, then there can be no recovery for the defamation alleged in Count Two because the defamatory implication of the discrete statements is not truly distinct from the larger thrust of the columns. In other words, the alleged defamatory impact of the columns in the aggregate is

no different from the defamatory implication allegedly conveyed by each of the individual statements.

Even if the discrete statements alleged in Count Two were independently actionable, Defendant is still entitled to summary judgment because Plaintiff has not come forth with evidence demonstrating that the statements are materially false. This showing of falsity is required of all defamation plaintiffs where the allegedly defamatory statements touch upon a matter of public concern. *See Wells v. Liddy*, 186 F.3d 505, 532 n.21 (4th Cir. 1999). A statement is deemed substantially true for purposes of defamation actions where "the substance, the gist, the sting, of the libelous charge be justified." *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. 1936)). Further, a statement will not be considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted). Thus, minor or irrelevant inaccuracies will not render a statement materially false.

Plaintiff unsuccessfully attempts to show the material falsity of the allegedly defamatory statements. First, for instance Plaintiff challenges the allegation that he had access to anthrax. Plaintiff points out that he only had access to a storage closet at Fort Detrick in which wet anthrax was kept, but that he did not know that anthrax was contained therein. Plaintiff contends that this fact, if taken as true, proves the material falsity of the statement that Plaintiff had access to the Fort Detrick Labs where anthrax was kept. This Court disagrees. This

is a case of an irrelevant inaccuracy, one in which pleaded truth would not have a different effect on the mind of the reader. *See Masson*, 501 U.S. at 517. The allegation that Plaintiff had access to anthrax is not rendered false simply because Plaintiff did not know he had access to anthrax. The fact that it was wet anthrax as opposed the to dry anthrax used in the anthrax mailings would likely not change the mind of the ordinary reader. A failure to include such a qualification does not form the basis for liability in a defamation action of this type.

Plaintiff next contends that the allegation that he had expertise in dry biological weapon agents is materially false because he has never made dry anthrax, has never done laboratory research on dry anthrax, and does not know how to make dry anthrax. Plaintiff's own assertions of what he knows or does not know cannot create a triable issue on a motion for summary judgment where there is substantial evidence that Plaintiff did in fact have extensive knowledge about biological weapons and agents. Furthermore, the record shows that Plaintiff touted himself as having working knowledge of wet and dry biological weapon agents, and even bragged to a colleague about his ability to make anthrax.

Plaintiff also challenges the statement that he had access to an isolated residence and gave Cipro to people who visited the residence. Plaintiff offered testimony of the owner of the residence in question, who testified that Plaintiff never visited the home without the owner, and therefore did not have unrestricted access. This fact does not alter the substantial truth of the statement that Plaintiff visited the residence, and thus had access to the

residence. Furthermore, although Plaintiff denies that he ever gave Cipro to anyone at the residence, the record is undisputed that taking Cipro was discussed during an October 2001 visit to the residence and that Plaintiff had dispensed Cipro to multiple persons before that weekend. Whether Plaintiff dispensed Cipro while at the residence or at some other point does not alter the gist of the published statement in any material way.

Plaintiff also challenges the statement that he failed three polygraph examinations, but he has not come forth with evidence sufficient to show that the published statement is materially false. Plaintiff contends that he only took one polygraph examination and that he did so voluntarily. However, it is undisputed that the FBI administered at least one polygraph examination that involved more than one test sequence. It is also undisputed that Plaintiff retained his own polygrapher in 2002. The FBI's continuing interest in Plaintiff even after the polygraph exam provides circumstantial evidence that the examination did not extinguish suspicion of Plaintiff. Thus, Plaintiff cannot show that this statement, even if inaccurate as to the exact number of polygraph examinations administered, is materially false.

Finally, Plaintiff challenges the statement that his private writings showed animus to federal agencies. Plaintiff claims that one writing in particular only showed dissatisfaction with one individual, an individual who was instrumental in suspending his security clearance. However, Plaintiff also authored a later writing, in which he described the government's conclusions with respect to a CIA

security decision as dated and illogical. Plaintiff has offered no evidence to contradict the veracity of these facts, or of the underlying gist that Plaintiff was displeased with the government's decision to terminate his security clearance.

Based on the foregoing, Plaintiff cannot carry his burden of proving the material falsity of any of these statements as a matter of law. Accordingly, Defendant is entitled to summary judgment with respect to Count Two on this ground.

Plaintiff's third Count alleges intentional infliction of emotional distress. Under Virginia law, to recover for intentional infliction of emotional distress, four elements must be proved: "(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable; (3) there was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress was severe." *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

As set forth above, Plaintiff cannot prevail on his defamation claim and is unable to prove the elements necessary to recover for intentional infliction of emotional distress. First, Plaintiff cannot make the requisite showing that Defendant intentionally or recklessly caused him severe emotional distress. This showing may be made by evidence that Defendant specifically intended to cause him severe distress or acted recklessly with respect to whether its conduct would cause his such severe distress. *See, e.g., Womack*, 210 S.E.2d at 148. Plaintiff has not made such a showing. In fact, the record shows that Defendant made efforts to avoid implicating his guilt. Mr. Kristof reminded readers to

assume Plaintiff's innocence, and highlighted the fact that Plaintiff was viewed by his family and friends as a patriot who could not have perpetrated the crime in question. The record is void of any evidence tending to show that Mr. Kristof intended to cause Plaintiff severe distress or that he was reckless in this regard.

Finally, Plaintiff cannot prove that Defendant's conduct was sufficiently outrageous. Plaintiff has failed to satisfy his burden of showing that Defendant engaged in any form of misconduct. Defendant did not act with malice when it published Kristof's columns. Additionally, Mr. Kristof cautiously worded the columns to indicate that Plaintiff was to be presumed innocent, and declined to reveal the true identity of Plaintiff until the Plaintiff himself publicly responded to the allegations. Therefore, Plaintiff cannot satisfy his burden as to Count Three of his complaint.

Considering all inferences in the light most favorable to Plaintiff, there is no evidence that would allow a jury to find that Defendant defamed Plaintiff or intentionally caused him severe emotional distress. Thus, Defendant is entitled to summary judgment on all counts.

An appropriate Order shall issue.

Claude M. Hilton

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 04-0807

January 30, 2007 Filed

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that Defendant's Motion for Summary Judgment is GRANTED and this case is DISMISSED.

/S/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

January 30, 2007

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

STEVEN J. HATFILL, Plaintiff

v.

THE NEW YORK TIMES COMPANY, Defendant.

Civil Action No. 1:04cv807 (CMH/LO)

October 20, 2006, Decided
October 20, 2006, Filed

Before: Liam O'GRADY, United States Magistrate Judge.

O'GRADY, United States Magistrate Judge.

ORDER

Upon consideration of the pleadings and for good cause shown, it is

ORDERED that Plaintiff's Motion to Compel the Identity of Defendant's Confidential Sources (Dkt. 83) is GRANTED. Plaintiff has brought this defamation action against Defendant, after Defendant published a series of columns alleging that Plaintiff was involved in the anthrax attacks which killed five people in 2001. Pursuant to 28

U.S.C. § 1332, this action comes to this Court under its diversity jurisdiction. On July 13, 2006, Plaintiff deposed Nicholas Kristof, the author of the columns published by Defendant. During that deposition, Plaintiff questioned Mr. Kristof about his sources for the columns and Mr. Kristof refused to identify five sources, whom he had promised confidentiality.[1]

Confidential Sources #2 and #3 were identified during Kristof's deposition as employees of the F.B.I. directly involved in the government's anthrax investigation. These sources provided Mr. Kristof with information or confirmed existing information regarding Plaintiff's ability to manufacture anthrax, the belief that Plaintiff had access to an isolated residence, and Plaintiff's results from polygraph tests. Confidential Source #4 was a colleague or perhaps a friend of Plaintiff's who provided Mr. Kristof with his opinion about Plaintiff's patriotism.

Plaintiff contends that his ability to question Mr. Kristof's sources is central to establishing Defendant's degree of fault for publishing the columns about Plaintiff.[2] Plaintiff urges the Court to apply Virginia law to this dispute and thus apply a

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[1] At the time Plaintiff filed his Motion to Compel, Mr. Kristof was withholding the identities of five sources. Since the motion was filed, two of those sources, Confidential Sources #1 and #5, have agreed to release Mr. Kristof from his promise and reveal their identities. Thus, only Confidential Sources #2, #3 and #4 remain the subject of this motion.

[2] The parties disagree on whether Plaintiff is a public figure, requiring him to prove actual malice by Defendant, or not a public figure, requiring him to prove only negligence by Defendant.

balancing test to determine whether Mr. Kristof should be entitled to a qualified reporter's privilege. Plainitff argues that direct examination of these sources will provide evidence regarding the reliability of the information, sources' areas of knowledge and any potential biases, overcoming any reporter's privilege under the balancing test.

Defendant argues that a choice-of-law analysis under Federal Rule of Evidence 501 reveals that New York or Maryland law, rather than Virginia, should govern the claim of privilege and thus, as a reporter, Mr. Kristof's sources are absolutely privileged under either Maryland or New York reporter "shield" statutes.

A. APPLICABLE LAW

In diversity cases, privileges are determined according to the state law that supplies the rule of decision. *See* Fed. R. Evid. 501. Thus, in diversity cases, Rule 501 directs the Court to apply state law, including state conflict-of-law provisions, to the law of privilege. This approach is consistent with the Supreme Court's holding in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) (holding that under the *Erie* doctrine, a federal court must apply the forum's conflict-of-law rules). The Fourth Circuit has not specifically ruled on the meaning of the second sentence of Rule 501. However, when analyzing Rule 501 in the diversity context, other courts have applied the conflict-of-law doctrines of the state in which it sits. *See, e.g., Samuelson v. Susen*, 576 F.2d 546, 550-51 (3rd Cir. 1978) (applying Pennsylvania's conflict-of-law rules to determine whether Ohio's or Pennsylvania's privilege law

applies); *Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass. 1979)(applying the conflict laws of Massachusetts, the forum state); *Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 473 (W.D. Tenn. 1979). Therefore, since this Court sits in the Commonwealth of Virginia, the Court finds that Virginia law, including Virginia conflicts-of-law, applies to this issue.

Virginia is a traditional state. As a result, "[i]t is well settled that Virginia . . . adheres to traditional conflict-of-law rules, when presented with a choice-of-law question." *Clark v. Clark*, 398 S.E.2d 82, 89 (Va. Ct. App. 1990). "[T]he *lex loci* will govern as to all matters going to the basis of right of action itself, while the *lex fori* controls all that is connected merely with the remedy." *Jones v. Jones*, 431 S.E.2d 33, 34 (Va. 1993) In more modern parlance, "Virginia courts are to determine whether an issue is procedural [*lex fori*] or substantive [*lex loci*] according to its own conflict rules. If the issue is deemed procedural under the conflict of law rules, the court shall apply [*6] its rules and procedure." *Clark*, 398 S.E.2d at 89. Further, on the issue of conflicts, Virginia has explicitly rejected any of the more recent approaches, including the approach advocated by the Restatement (Second) of Conflicts of Laws. *See McMillan v. McMillan*, 253 S.E.2d 662, 664 (Va. 1979).

The Virginia courts have not spoken specifically on the issue of whether the law of privilege is procedural or substantive. They have, however, provided guidance on how a Virginia court would classify the law of privilege, if it had the opportunity

to consider the issue. In Virginia, "the best rule seems to be that the rights of the parties with respect to their causes of action are governed by *lex loci*, while the admissibility of evidence and the enforcement of those rights are governed by the *lex fori*." *Baise v. Warren*, 164 S.E. 655, 656 (Va. 1932).[3] Further, the Virginia court has stated that "all questions of procedure, burden of proof and sufficiency of evidence" are considered procedural. *D.T. Vicars v. Atlantic Discount Co., Inc.*, 140 S.E.2d 667, 670 (Va. 1965). Thus, it appears to this Court that for the reporter's privilege, a common law privilege under Virginia law, is a question of evidence.[4] Thus, this Court finds the law of privilege,

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[3] Defendant contends that granting this motion will strip Mr. Kristof of his right to protect his sources. As first glance, such a "right" might make it appear as though the reporter's privilege should be governed by *lex loci*. However, the Virginia rule seems to only consider the "rights of the parties with respect to their causes of action" and Mr. Kristof is only a third-party to this dispute. Thus, the existence or lack thereof of a third-party's rights are not a substantive issue under Virginia choice-of-law rules.

[4] Defendant contends that the law of privilege should be treated as substantive and provides *McCauley v. Purdue Pharma, L.P.*, 224 F. Supp.2d 1066 (W.D.V.A. 2002) as its support. While the federal court in *McCauley* did find that the physician-patient privilege was substantive under Virginia choice-of-law rules, this case is distinguishable. First, the court states that the Virginia physician-patient privilege did not exist under state common law and was enacted as a qualified statutory privilege, under Va Code Ann. § 8.01-399. The *McCauley* court also noted that the "Virginia Supreme Court has held that this statute not only sets out a rule of evidence, but it also provides grounds for a cause of action against any practitioner who discloses a patient's medical records in violation of it." *Id.* at 1068. Virginia has not enacted a statutory privilege related to the reporter's privilege, nor has the Virginia General Assembly

absent an applicable statute, is governed by procedural or *lex loci* rules[5] and would therefore apply the Virginia common law regarding the reporter's privilege. The Court also takes note that Virginia would not be the only state to treat this type of privilege as procedural.[6]

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created a cause of action against a reporter who discloses a source's identity. Further, Virginia has developed common law related to a qualified privilege for reporters. *See Philip Morris Co. Inc. v. American Broadcasting Co. Inc.*, 1995 WL 301428 (Va. Cir. Ct.1995). Thus, Court finds *McCauley* unpersuasive.

[5] A leading treatise on federal practice and procedure also reports that this decision conforms with the older, or more traditional, choice-of-law rules. "[T]he older view was that evidence was procedural and fell, therefore, within the principle that matters of procedure were governed by the law of the forum. The original Restatement had no provision dealing with privileges; apparently they were to be dealt with under the rule that in matters of evidence the law of forum governs. Though this approach has been criticized, it seems defensible if one views privileges as a restriction on the power of the courts to compel testimony . . . . [T]here is no reason why the local court should have its power to elicit evidence curtailed because another state has decided to limit the power of its courts and the evidence sought has some connection with the state." State Law Proviso-Choice of Law, 23 Fed. Prac. & Proc. Evid. § 5435 (2006).

[6] In *Union Planters National Bank of Memphis v. ABC Records, Inc.*, the federal court, in a diversity action, followed Rule 501 and used Tennessee choice-of-law rules to determine whether to apply Tennessee or California law to the issue of attorney-client privilege. 82 F.R.D. 472 (W.D. Tenn. 1979). The court decided that Tennessee would "hold that in the present situation the attorney-client privilege is a question of evidence and that in determining the scope and validity of the privilege the law of Tennessee would govern." *Id.* at 473. Although Tennessee had embodied its common law rule of attorney-client privilege in a statute, the legislature concerned themselves only with matters

B. REPORTER'S PRIVILEGE UNDER VIRGINIA LAW

Under Virginia law, reporters have a qualified privilege against disclosure of confidential sources in public figure defamation cases. *See Philip Morris Co. Inc. v. American Broadcasting Co. Inc.*, 1995 WL 301428 (Va. Cir. Ct.1995). Per the guidance of *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Virginia court found that it must balance the interests involved when compelling the identification of confidential sources. *Id.* In doing so, the Virginia courts have applied the three-part balancing test adopted by the Fourth Circuit in *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986). *See Philip Morris*, at *6; *see also Clemente v. Clemente*, 2001 WL 1486150 (Va. Cir. Ct. 2001).

Under the *LaRouche* test, the court considers: "(1) whether the information is relevant, (2) whether the information can be obtained by alternate means, and (3) whether there is a compelling interest in the information." *LaRouche*, 780 F.2d at 1139. Applying the facts of this case to the *LaRouche* test, the Court finds that the balance tips in favor of disclosure.

In *Philip Morris*, the Virginia court found that information about the confidential source is relevant to the state of mind of the reporter at the time the

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of evidence and did not create a cause of action. Therefore, the federal court found this statute to be a matter of procedural law under the Tennessee choice-of-law rules. *See also Ghana Supply Commission v. New England Power Co.*, 83 F.R.D. 586, 589 (D. Mass. 1979) (looking to the conflicts law of the forum state and holding that questions of privilege are procedural under Massachusetts law).

reporter made the allegedly defamatory statements as well as relevant to the credibility of published statements resulting from information provided by the source. *Id.* at *8. Here, Defendant has asserted that it acted without the requisite intent. In order for Plaintiff to meet its burden in the defamation case and offer evidence as to the reporter's state of mind, Plaintiff needs an opportunity to question the confidential sources and determine if Mr. Kristof accurately reported information the sources provided. Further, Plaintiff contends that there is some question as to the accuracy of Mr. Kristof's reporting. Plaintiff has deposed a formerly confidential source, Dr. Barbara Rosenberg, and discovered that her testimony contradicts Mr. Kristof's testimony regarding what Dr. Rosenberg told him. In addition, Defendant contends that Confidential Source #4's information is not relevant because the source said primarily positive things about Plaintiff. If this is true and these statements were left out of the article or if Confidential Source #4 made statements which cast doubt on Kristof's allegation that Plaintiff was the anthrax mailer, then the information from Confidential Source #4 is relevant to Plaintiff's case. As Plaintiff needs to acquire a full understanding of Mr. Kristof's state of mind and verify the accuracy of the statements from the confidential sources, the information is central to this dispute and thus relevant under the *LaRouche* test.

Plaintiff contends that it can not determine the identities of the confidential sources through alternate means, because Mr. Kristof has not provided enough identifying information. For example, although Plaintiff knows that Confidential

Sources #2 and #3 are employees of the F.B.I., hundreds of agents and employees of the F.B.I. have worked on the anthrax investigation. Thus, Plaintiff argues that deposing all of these individuals to determine which two are the confidential sources would be impossible. In addition, Plaintiff has served a Rule 30(b)(6) deposition on Defendant asking for a representative who knows the identities of the sources, and Defendant has only identified Mr. Kristof. Thus, the Court is in agreement with Plaintiff that this information is not available by means other than compelled disclosure.

The final part of the *LaRouche* test considers whether there is a compelling interest in the information. Defendant argues that Plaintiff's interest has not ripened into a "compelling" one since Defendant has not placed either the information provided by the sources or the sources themselves at issue. Thus, Defendant argues that determination of the issue should be deferred until such time as the record of Plaintiff's need is more fully developed. The close of discovery is pending. Under Defendant's view when Defendant decides to put the confidential sources or their information at issue, then the Court would need to reopen discovery to allow Plaintiff time depose the confidential sources. This is not an acceptable solution. Rather, as demanded by *Branzburg*, the Court must make a case-by-case analysis of the needs of the plaintiff. 408 U.S. 665 (1972). In this case, the Court finds that even if Defendant does not place the confidential sources or their information at issue, Plaintiff may need to do so in order to effectively prove his case.

The Court understands the need for a reporter to be able to credibly pledge confidentiality to his sources. Confidential sources have been an important part of journalism, which is presumably why Virginia recognizes a qualified reporter's privilege in the first place. But that privilege must be balanced against the rights of a plaintiff and in Virginia, this balance is embodied by the *LaRouche* test. Thus, after balancing the burdens to both sides, the Court finds that the balance favors disclosure. Thus, it is ORDERED that Defendant shall reveal the identity of Confidential Sources #2, #3 and #4, to Plaintiff no later than Wednesday, October 25, 2006.

Entered this 20th day of October, 2006.

Liam O'Grady

United States Magistrate Judge

Alexandria, Virginia

APPENDIX F

The New York Times

Section A; Column 6; Page 21

January 4, 2002, Friday
Late Edition, Final

PROFILE OF A KILLER

By Nicholas D. KRISTOF

I think I know who sent out the anthrax last fall.

He is an American insider, a man working in the military bio-weapons field. He's a skilled microbiologist who did not aim to kill anybody or even to disrupt the postal system. Rather, he wanted to sow terror. Like many in the bio-warfare field, he felt that the government was not sufficiently attuned to the risks of anthrax, so he seized upon the opportunity presented by Sept. 11 to get more attention and funding for bio-terror programs like those that have been his career.

How do I know all this? Well, I don't exactly. But talk to the people in the spooky world of bio-terror awhile, sop up the gossip and theories, and as you put the clues together -- as bio-terror experts and F.B.I. officials are now doing -- a hazy picture seems to come into focus. It's not a certainty but an

educated guess, circulating among many who know their business.

"I think there are on the order of 100 people who could have done it, who have the access to the spores and the technical expertise to have done it," says one man with long experience in the shadows of the United States bio-defense program. "I've got to admit that I could be a suspect. I've been interviewed by the F.B.I."

The emerging image of the killer that many of the experts see (but not all; anthrax experts agree about as much as economists do) is precisely the opposite of the perpetrator whom we initially imagined. Our first impulse when catastrophes happen is to look for foreigners to round up, as we did after the Oklahoma City bombing and after the crash of Flight 800. The Bush administration tried hard to find evidence to pin the anthrax attacks on Iraq.

In fact, many experts believe that the killer is tied to the American bio-weapons program because the anthrax he sent out is genetically identical to the anthrax kept by the United States Army. A microbiologist named Paul Keim is helping the authorities compare the genetic fingerprint of the mailed anthrax, and every indication is that it derives at least indirectly from the mother lode of the military strain, kept at Fort Detrick, Md.

The mailed anthrax is also astonishingly pure and equivalent (in spore size and concentration) to the best the American Army ever achieved. Making anthrax in a dry powdered form of this quality is difficult, and beginning in 1959 took 900 workers in the "hot" area of Fort Detrick years of effort (and two

accidental deaths, including that of an unlucky electrician who changed light bulbs at the wrong time). Thus it seems that the murderer had access not only to the American military germs but also to some knowledge of the American military method of preparing it in its dry form.

Why do specialists agree that the murderer was not trying to kill anybody? Because he taped the envelopes tightly, and as of September nobody expected that the spores could leak through envelopes. Moreover, each of the letters that has been recovered announced that the substance was anthrax and advised the recipient to take antibiotics.

"I don't think that he was trying to kill anybody," said Barbara Hatch Rosenberg, a microbiologist who has studied the attacks for the Federation of American Scientists. "I think the motive was to create public fear, to raise the profile of biological warfare."

The F.B.I. may already have talked to the killer. There are not that many people with the access to germs, the knowledge and an anthrax vaccine booster shot in the last year. But the murderer showed a knowledge of forensics (apparently not licking a stamp or envelope, for example, to avoid leaving DNA), and it may be very difficult to move from suspicions to sufficient proof for an arrest.

Washington has been pressing Russia, Pakistan and other countries, quite rightly, to improve their control of germs, chemicals and nuclear weapons. But one of the lessons of the anthrax investigation is that the first thing we need to do to feel safer is put our own house in order. It is appalling that we

cannot even determine which labs have exchanged anthrax with Fort Detrick.

Terrorism and laxity, it seems, afflict not only foreigners with different complexions and religions, but -- in exceptional cases -- perhaps also those with white lab coats and military haircuts.

APPENDIX G

The New York Times

Section A; Column 5; Page 25

May 24, 2002, Friday
Late Edition, Final

CONNECTING DEADLY DOTS

By Nicholas D. KRISTOF

Why didn't the Bush administration connect the dots and take aggressive measures before 9/11?

For the same reason we're not doing so today: distractions and a lack of urgency. Forget about the blame game -- for it's just that kind of distraction. It's more important to look ahead and try to block the next attack. Where are the dots today?

One dot is Osama bin Laden's fervent efforts to obtain bio-weapons, reflected in the lab he was building near Kandahar, Afghanistan, to produce anthrax.

Another dot is Iraq. Hazem Ali, a senior Iraqi virologist involved in his country's bio-weapons program, has admitted working with camelpox virus. It's a puzzling choice for a bio-weapon because it's a mild disease -- except, as Jonathan Tucker notes in his book "Scourge," Iraq may be genetically

engineering camelpox into something closer to smallpox. A scientist who once worked in the Soviet bio-weapons program told me of a visit by Iraqi scientists inquiring about genetic engineering of germs.

A third dot is our vulnerability. The Brentwood mail-sorting facility in Washington is still closed because of contamination, as is the Hamilton Township processing center in New Jersey. Just 100 anthrax letters, if mailed around the nation, could close down the U.S. postal system.

A fourth is our failure to capture the anthrax killer, suggesting to Iraq and other potential perpetrators that they might get away with an attack.

So connect these dots and what do they suggest? A biological threat that requires much more vigorous and urgent countermeasures.

Richard Danzig, a bioterror expert and former secretary of the Navy, noted that the anthrax attacks in the fall could be thought of as 5/11: 5 people died, and 11 were infected with inhalation anthrax. Today people worry more about 9/11 scenarios than about 5/11 attacks -- even though a bioterror attack could be incomparably more devastating.

"The more significant national security issue is 5/11," Mr. Danzig said. "The risk of recurrence is high, and could involve anything from a few casualties to tens of thousands. Accordingly, I think this is urgent."

The government once conducted an experiment using a Navy ship two miles off San Francisco to release harmless spores that had the same size and

weight as anthrax. Experts tracked the spores and concluded that had this been anthrax, several hundred thousand people might have died -- although no one would have been aware of the attack until the victims developed fevers four days later.

One of the first steps we can take to reduce our vulnerability is to light a fire under the F.B.I. in its investigation of the anthrax case. Experts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax.

These experts point, for example, to one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack.

I say all this to prod the authorities, for although the F.B.I. has known about this handful of people since October, it has been painstakingly slow in its investigation. Let's hope it will pick up the pace, for solving the case would reduce our vulnerability to another attack.

At a policy level, how are we doing at reducing our vulnerability?

"I don't think anything significant has been done to reduce our vulnerability just yet, aside from creating greater awareness," said Barbara Hatch Rosenberg, a microbiologist who studies bioterrorism for the Federation of American Scientists.

So what should be done? Experts offer suggestions like these:

Smallpox vaccination should begin on a voluntary basis.

Air filtration should be upgraded in landmark buildings. Humidity should be kept above 20 percent so that particles will clump together and aerosol attacks are less effective.

Germ detectors developed by the military should be installed in Grand Central Terminal and elsewhere in New York City. These detectors don't work well, but they are being used at key locations in Washington -- though not in New York. The message seems to be: "Pentagon to City: Drop Dead."

APPENDIX H

The New York Times

Section A; Column 1; Page 21

July 2, 2002, Tuesday
Late Edition, Final

ANTHRAX? THE F.B.I. YAWNS

By Nicholas D. KRISTOF

The F.B.I.'s bumbling before 9/11 is water under the bridge. But the bureau's lackadaisical ineptitude in pursuing the anthrax killer continues to threaten America's national security by permitting him to strike again or, more likely, to flee to Iran or North Korea.

Almost everyone who has encountered the F.B.I. anthrax investigation is aghast at the bureau's lethargy. Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters.

This is part of a larger pattern. Astonishingly, the F.B.I. allowed the destruction of anthrax stocks

at Iowa State University, losing what might have been valuable genetic clues. Then it waited until December to open the intact anthrax envelope it found. The F.B.I. didn't obtain anthrax strains from various labs for comparison until March, and the testing is still not complete. The bureau did not systematically polygraph scientists at two suspect labs, Fort Detrick, Md., and Dugway Proving Ground in Utah, until a month ago.

Perhaps it's a cheap shot for an armchair detective to whine about the caution of dedicated and exceptionally hard-working investigators. Yet months pass and the bureau continues to act like, well, a bureaucracy, plodding along in slow motion. People in the biodefense field first gave Mr. Z's name to the bureau as a suspect in October, and I wrote about him elliptically in a column on May 24.

He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.

If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard "hot suite" at Fort Detrick, surrounded only by blushing germs.

With many experts buzzing about Mr. Z behind his back, it's time for the F.B.I. to make a move: either it should go after him more aggressively, sifting thoroughly through his past and picking up

loose threads, or it should seek to exculpate him and remove this cloud of suspicion.

Whoever sent the anthrax probably had no intention of killing people; the letters warned recipients to take antibiotics. My guess is that the goal was to help America by raising preparedness against biological attacks in the future.

So it seems fair to ask the F.B.I. a few questions:

Do you know how many identities and passports Mr. Z has and are you monitoring his international travel? I have found at least one alias for him, and he has continued to travel abroad on government assignments, even to Central Asia.

Why was his top security clearance suspended in August, less than a month before the anthrax attacks began? This move left him infuriated. Are the C.I.A. and military intelligence agencies cooperating fully with the investigation?

Have you searched the isolated residence that he had access to last fall? The F.B.I. has known about this building, and knows that Mr. Z gave Cipro to people who visited it. This property and many others are legally registered in the name of a friend of Mr. Z, but may be safe houses operated by American intelligence.

Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded, the one that sickened more than 10,000 black farmers in Zimbabwe in 1978-80? There is evidence that the anthrax was released by the white Rhodesian Army fighting against black guerrillas, and Mr. Z has claimed that he participated in the white army's much-feared Selous

Scouts. Could rogue elements of the American military have backed the Rhodesian Army in anthrax and cholera attacks against blacks? Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work in the American biodefense program with some of the world's deadliest germs?

What now? When do you shift into high gear?

APPENDIX I

The New York Times

Section A; Column 6; Page 19

July 12, 2002, Friday
Late Edition, Final

THE ANTHRAX FILES

By Nicholas D. KRISTOF

When someone expert in bio-warfare mailed anthrax last fall, it may not have been the first time he had struck.

So while the F.B.I. has been unbelievably lethargic in its investigation so far, any year now it will re-examine the package that arrived on April 24, 1997, at the B'nai B'rith headquarters in Washington. The package contained a petri dish mislabeled "anthracks."

The dish did not contain anthrax. But a Navy lab determined that it was bacillus cereus, a very close, non-toxic cousin of anthrax used by the Defense Department.

Anybody able to obtain bacillus cereus knew how to spell "anthrax." An echo of that deliberate misspelling came last fall when the anthrax letters suggested taking "penacilin."

The choice of B'nai B'rith probably was meant to suggest Arab terrorists, because the building had once been the target of an assault by Muslim gunmen. In the same way, F.B.I. profilers are convinced that the real anthrax attacks last year were conducted by an American scientist trying to pin the blame on Arabs.

In a column on July 2 I wrote about "Mr. Z," an American bio-defense insider who intrigues investigators and whose career has been spent in the shadowy world of counterterror and intelligence. He denies any involvement in the anthrax attacks.

On the date that the perpetrator chose for the B'nai B'rith attack, a terrorism seminar was under way in the Washington area and Mr. Z seemed peeved that neither he nor any other bio-defense expert had been included as a speaker. The next day, Mr. Z sent a letter to the organizer saying that he was "rather concerned" at the omission and added: "As was evidenced in downtown Washington D.C. a few hours later, this topic is vital to the security of the United States. I am tremendously interested in becoming more involved in this area. . . ."

Over the next couple of years, Mr. Z used the B'nai B'rith attack to underscore the importance of his field and his own status within it. "Remember B'nai B'rith," he noted at one point. In examples he gave of how anthrax attacks might happen, he had a penchant for dropping Arab names.

The F.B.I. must be on top of the B'nai B'rith episode, right? Well, it was told about it months ago. But B'nai B'rith says it hasn't been asked about the incident by the F.B.I.

The authorities seem equally oblivious to another round of intriguing anthrax hoaxes in February 1999. As with last fall's anthrax letters, a handful of envelopes with almost identical messages were sent to a combination of media and government targets including The Washington Post, NBC's Atlanta office, a post office in Columbus, Ga. (next to Fort Benning, an Army base), and the Old Executive Office Building in Washington (where Mr. Z had given a briefing three months earlier).

I found a local policeman in Columbus willing to dig out his file on that 1999 anthrax hoax. There are several similarities with last fall's mailing. For example, one page of the 1999 letter says, in big, bold capitals: "WARNING: THIS BUILDING AND EVERYTHING IN IT HAS BEEN EXPOSED TO ANTHRAX. CALL 911 NOW AND SECURE THE BUILDING. OTHERWISE THE GERM WILL SPREAD."

Last fall's letters are also in bold capitals and use similar language patterns.

In contrast to the 1997 package with fake anthrax gelatin, the 1999 letters each contained a teaspoon of fake anthrax powder (roughly the same amount as of real anthrax in 2001). That's interesting because as of 1997, U.S. bio-defense scientists were working basically only with wet anthrax, while by 1999 some had experimented with making powders.

For example, Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: "working knowledge of wet and dry BW biological

warfare agents, large-scale production of bacterial, rickettsial and viral BW pathogens and toxins."

Two outside consultants used by the F.B.I. to examine documents in the anthrax case, Don Foster and Mark Smith, both say they have not been shown the 1997 or 1999 hoax letters. The 1999 envelopes carried stamps, which may have been licked.

It would be fascinating to know whose DNA that is. Perhaps when the F.B.I. is finished defending itself from charges of lethargy, it will check.

APPENDIX J

The New York Times

Section A; Column 6; Page 17

July 19, 2002, Friday
Late Edition, Final

CASE OF THE MISSING ANTHRAX

By Nicholas D. KRISTOF

It's bad enough that we can't find anthrax hidden in the Iraqi desert. But it turns out that we also misplaced anthrax and Ebola kept in a lab outside Washington D.C.

Internal Army documents about the U.S. biodefense program describe missing Ebola and other pathogens, vicious feuds, lax security, cover-ups and a "cowboy culture" beyond anyone's scrutiny. Moreover, germ warriors in the C.I.A. and the Defense Department decided -- without bothering to consult the White House -- to produce anthrax secretly and tinker with it in ways that arguably put the U.S. in violation of the Biological Weapons Convention.

It's time for Congress or an outside commission to investigate our nation's biodefense program and establish oversight.

"Shenanigans have been going on," declares one internal Army memo about the labs at ground zero of the biodefense world: Usamriid, the acronym for the U.S. Army Medical Research Institute of Infectious Diseases, based at Fort Detrick, Md.

The 400 pages of documents, which I've obtained and which were described by The Hartford Courant earlier this year, quote a newly arrived officer named Michael Langford as saying in about 1992 that he found "little or no organization," "little or no accountability," "a very lax and unorganized system" and signs of covert work and cover-ups.

Mr. Langford requested an inventory of pathogens acquired in 1991. The resulting memo shows that 62 samples had vanished, including Ebola, hantavirus, anthrax, S.I.V. (the monkey version of the virus that causes AIDS), and several described only as "unknown."

Usamriid says that it rechecked this year and was able to account for virtually all of the missing specimens except one set that would have been irradiated to render it harmless. But a decade's delay in bothering to look for missing Ebola seems a bit much, and conversations with scientists who have worked at Usamriid do not inspire confidence (although, in fairness, many who talk publicly have lawsuits pending against the lab).

"When I was laid off, I walked out for three days in a row with boxes, and no one looked inside them," recalled Richard Crosland, who worked at Usamriid from 1986 to 1997. "I was there for 11 years, and never once did anyone ask, 'Where is the substance you ordered?'

"I could have walked out with it when I left, and no one would have known. I didn't, but I could have. 7-Eleven had better inventory control. And I was working with botulinum, which is one of the deadliest substances on earth.

"If you couldn't find a microscope, you were in real trouble. But if you misplaced five micrograms of botulinum that could kill thousands of people, nobody would notice."

In truth, many microbiology labs are pretty chaotic, and ultimately labs have to pick reliable people and then trust them. But that's what piqued my interest in Usamriid in the first place -- my research about a man I've called "Mr. Z," who has been interviewed four times by the F.B.I. and whose home has been searched twice in connection with the anthrax investigation. Usamriid hired Mr. Z in 1997 to work with Ebola and Marburg viruses, although he had spent years in the armed forces of Rhodesia and apartheid South Africa.

Most researchers at Usamriid are dedicated patriots who could earn more in the private sector. When Mr. Z left Usamriid in 1999, he was making $58,000 a year -- and jumped to a $150,000-a-year job with a private contractor. Many biodefense scientists risk their lives working with deadly germs to improve vaccines for American troops, and they deserve our gratitude.

Still, the Army documents indisputably point out serious problems. They recount incidents in 1992 when someone appeared to be working secretly with anthrax at night and on weekends and then trying to cover it up. Memos describe how someone tried to

roll back a numerical counter on an electron microscope to hide his work with anthrax.

As recently as April of this year, anthrax spores were found in a hallway and administrative area of Usamriid -- shortly after Senator Mary Landrieu, a Louisiana Democrat, visited the complex. Anthrax spores seem to have it in for Democratic senators.

APPENDIX K

The New York Times

Section A; Column 1; Page 19

August 13, 2002, Tuesday
Late Edition, Final

THE ANTHRAX FILES

By Nicholas D. KRISTOF

It's time for me to come clean on "Mr. Z."

Since May, I've written periodically about a former U.S. Army scientist who, authorities say privately, has become the overwhelming focus of the investigation into the anthrax attacks last fall. I didn't name him.

But over the weekend, Mr. Z named himself: He is Steven J. Hatfill, 48, a prominent germ warfare specialist who formerly worked in the Army labs at Fort Detrick, Md. Dr. Hatfill made a televised statement on Sunday, describing himself as "a loyal American" and attacking the authorities and the media for trying "to smear me and gratuitously make a wasteland of my life."

The first thing to say is that the presumption of innocence has already been maimed since 9/11 for foreign Muslims, and it should not be similarly

cheapened with respect to Dr. Hatfill. It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional physical evidence linking him to the attacks.

Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax "fall guy." The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his private writings. He has also failed three successive polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago.

So far, the only physical evidence is obscure: smell. Specially trained bloodhounds were given scent packets preserved from the anthrax letters and were introduced to a variety of people and locations. This month, they responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former girlfriend's apartment, as well as to restaurants that he had recently entered (he is under constant surveillance). The dogs did not respond to other people, apartments or restaurants.

Putting aside the question of Dr. Hatfill and the anthrax, there are two larger issues.

First is the F.B.I.'s initial slowness in carrying out the anthrax investigation. Why did it take nine months to call in the bloodhounds, or to read Dr. Hatfill's unpublished novel, "Emergence," which has been sitting in the copyright office since 1998 and

draws on his experiences in South Africa and Antarctica to recount a biological warfare attack on Congress?

Second is the need for much greater care within the U.S. biodefense program. Dr. Hatfill's resume made claims (a Ph.D. degree, work with the U.S. Special Forces, membership in Britain's Royal Society of Medicine) that appear false, but these were never checked.

Moreover, what was a man like Dr. Hatfill who had served in the armed forces of two white racist governments (Rhodesia and South Africa) doing in a U.S. Army lab working with Ebola? With a new wave of funding for smallpox and anthrax research, we must be doubly careful that the spread of pathogens to new labs solves problems rather than creates them.

The White House is putting strong pressure on the F.B.I. to solve the anthrax murders. Top administration officials would love to find an Iraqi connection, but would settle for solving the case. The F.B.I. director, Robert Mueller, is pushing back, saying that nothing would be worse for the bureau than a premature prosecution that would fizzle in court.

To its credit, in the last few months, the bureau has finally picked up its pace. Its experts in Quantico are belatedly examining anthrax hoax letters sent in 1997 and 1999 that bear fascinating resemblance to the real anthrax letters. Investigators are looking at another hoax letter with intriguing parallels to the real one; that hoax was sent to Senator Tom Daschle

from London in mid-November, when Dr. Hatfill was visiting a biodefense center in England.

Partly because of the newfound energy, the F.B.I. has lately been enjoying genuine progress in its anthrax investigation. People very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

No. 08-483

In the
Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Of Counsel:

DAVID E. MCCRAW
THE NEW YORK TIMES COMPANY
620 8th Avenue
New York, NY 10018
(212) 556-4031

LEE LEVINE
Counsel of Record
DAVID A. SCHULZ
MICHAEL D. SULLIVAN
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 17TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20036
(202) 508-1100

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether summary judgment was properly entered in this defamation action on the ground that the plaintiff is a limited-purpose public figure who failed to produce sufficient evidence from which a reasonable jury could find "actual malice" by the requisite clear and convincing evidence.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) and Rule 29.6 of the Rules of the Supreme Court of the United States, the following are parties to the proceeding below:

The New York Times Company, appellee below and respondent here, is a publicly traded company and has no affiliates or subsidiaries that are publicly owned, and no publicly held company owns more than 10% of its stock.

Steven J. Hatfill, appellant below and petitioner here, is an individual.

Nicholas Kristof, an individual, was dismissed as a defendant in the case by the district court pursuant to a stipulated order, and he is not a party to this proceeding.

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The Petition should be denied because it (1) misrepresents the record evidence, *see* S. Ct. R. 15.2, (2) misstates the Fourth Circuit's holdings, and (3) posits nonexistent conflicts between those holdings and the decisions of this and other courts.

STATEMENT OF THE CASE

Shortly after September 11, 2001, anthrax-laced letters killed five people, generating intense public concern about who was responsible and whether further such attacks were forthcoming. J.A.255. The mailings reinvigorated a national debate about our vulnerability to bioterrorism and ability to prevent another attack. J.A.342-403.

A. Hatfill and Bioterrorism

Petitioner Steven Hatfill was an active participant in this debate long before the attacks, and his participation continued thereafter. He had for years publicly advocated his views that our government was ill-prepared to respond to bioterrorism, that knowledgeable scientists (including himself) could easily weaponize biological agents such as anthrax, and that the 2001 attack was the work of foreign terrorists.

Hatfill emerged on the national scene in 1996, following his return from two decades abroad, where he served in the Rhodesian military while pursuing degrees there and in South Africa. J.A.507-13. In 1996, he won a fellowship at the National Institutes of Health by submitting a résumé falsely claiming a Ph.D. along with a forged diploma. J.A.513-15,563-66,569. In 1997, he received another fellowship – also based on his false claim of a Ph.D. – to work full-

time at the United States Army Medical Research Institute of Infectious Diseases ("USAMRIID") at Fort Detrick. J.A.515-18,607,614-15. Employed there until September 1999, Hatfill was cleared to work with Biosafety Level 3 pathogens, which include anthrax. J.A.449,615,633-37.

The Ames strain of anthrax used in the attacks was present at USAMRIID. Throughout the period Hatfill was employed there, anthrax studies were conducted in the buildings where he worked. J.A.596-98,617-24,627-30. Anyone who had access to certain biocontainment areas, as Hatfill did, had access to anthrax spores. J.A.589-90,594-95,599-602,625-37. Hatfill was one of about 100 people with authorized access to an unlocked closet, located down the hall from one of his laboratories, where Ames strain anthrax was kept. *Id.* The spores were in a "wet" form and constituted "seed" from which "dry" anthrax powder could be produced. J.A.596-97,758-68,1602-09.[1]

At USAMRIID, Hatfill became, in his words, "increasingly aware of the potential public health risk caused by the release of a virulent virus in a densely populated area." J.A.514. The more he learned about "[s]everal anthrax hoaxes . . . described in the media," the "more alarmed [he] became about this potential threat." *Id.* As a result,

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[1] The Petition's representation that Hatfill had no "access" to "secure facilities in which [anthrax] was *studied*," Pet.3 (emphasis added), is carefully crafted to conceal the undisputed fact that he had access to the facility, and the specific cabinet, in which anthrax was *kept*.

Hatfill "worked tirelessly to raise awareness of the bioterrorism and bioweapons threats," J.A.1570, and became known for his warnings that the U.S. was under-prepared. J.A.514-20,572-87,593,603-05,1736. His own press spokesman asserted Hatfill was "very concerned for a long time that the United States [wa]s not doing enough to protect itself against the possibility of biological terrorism[,] and he spoke about it. He was kind of a whistleblower of sorts in government on the issue." J.A.1736.

To promote his views, Hatfill gave multiple public speeches. J.A.326-39,514-20,682-92. During one appearance, he demonstrated "how easy it would be for a terrorist to culture infectious disease organisms using only low technology methods dating from the 1800's." J.A.515. Hatfill engaged the popular press as well, appearing, for example, on CBS Radio as a "guest-expert" and giving an interview to a *Washington Times* columnist. J.A.283-84,572,579. In the resulting column, Hatfill hypothesized scenarios for a bioterrorist attack, including the release of anthrax into a public building's ventilation system. J.A.283-84. Later, he gave an interview to *Insight* magazine, during which he theorized that unidentified fumes detected at airports "could be a form of testing for a possible future bioterrorist attack – perhaps next time using anthrax." J.A.285-86. Described as "a specialist in bioterrorism management," Hatfill again discussed the release of a pathogen in a public building. *Id.* For another article, Hatfill posed for a photograph in which he demonstrated "how a determined terrorist could cook up a batch of plague in his or her own kitchen using

common household ingredients." J.A.287-89,2070. He was identified by multiple publications internationally as someone who could culture pathogens at home. J.A.290-309.

Following a 1997 anthrax hoax at B'nai B'rith headquarters in Washington, Hatfill contacted nationally syndicated radio and television shows, offering himself as a guest. J.A.310-13,579. On one program, he was an "audience favorite" who discussed "how anthrax can be sent in the mail." J.A.314-15. Shortly after the B'nai B'rith hoax, Hatfill wrote to organizers of a conference on "Super Terrorism," offering himself as a speaker on this "vital" national security issue because he was "tremendously interested in becoming more involved in this area." J.A.282. Hatfill also appeared on the Voice of America radio network, Radio America, and Canadian television, and another interview of him was included in a book about bio-weapons. J.A.321-25,579,664.

Hatfill also pursued other public-speaking engagements, including a lecture entitled "Building a Biobomb" at the Council on Foreign Relations and a presentation attended by the press on "Emerging Threats of Biological Terrorism." J.A.326-39,514-16,682-92. During at least one of his public appearances, Hatfill hypothesized a bioterror attack at the White House. J.A.515-16. Hatfill registered with the Copyright Office a novel detailing a bioterrorist plot against government officials. J.A.316-20.

In August 1998, Hatfill spoke at the Defense Department's Worldwide Conference on Antiterrorism, alongside William Patrick, the nation's foremost expert on anthrax production. J.A.653. Hatfill cultivated a relationship with Patrick and boasted that Patrick had shared with him "a lot of technical knowledge about bioweapons and bioweaponeering." J.A.591-92,641,649-50,704-05,708,723-30,732-34,744.

In January 1999, Hatfill was hired by Science Applications International Corporation ("SAIC"), a prominent government contractor. Hatfill's SAIC supervisors valued his "extensive network of contacts within the Department of Defense, the special operations community, and the Central Intelligence Agency" and viewed his expertise in biological weapons as a "valuable asset." J.A.789-90,805,885. SAIC touted Hatfill to potential clients as someone with a "thorough working knowledge of offensive biological warfare" gained "under the tutelage of William C. Patrick." J.A.723.

At SAIC, Hatfill wrote several papers and gave many presentations on these topics. One paper about the government's response to anthrax hoaxes bemoaned its "complete misunderstanding about dry powder agents." J.A.905-15. Another, co-authored with Patrick, described a bio-weapons laboratory in a single room that "feature[s] all the necessary equipment for bacterial BW agent scale-up fermentation and processing" and contained a section on anthrax. J.A.1459,1486-89.

While at SAIC, Hatfill attended classified briefings during which Patrick "described in detail processes for producing powdered anthrax" and Hatfill delivered at least one such briefing in Patrick's stead, a presentation described as "[e]xtremely detailed." J.A.707,709-12,735-37,753-73,960,966-1330. Hatfill also commissioned a study by Patrick concerning the risk of anthrax sent through the mail, which detailed the characteristics of weaponized dry anthrax. J.A.1534-65.

Hatfill held himself out to SAIC, the government, and the public as someone who possessed significant expertise concerning biological agents, including anthrax. His résumé touted his "working knowledge . . . of wet and dry BW agents," and his colleagues believed he was "highly knowledgeable about biological weapons and agents," including anthrax. J.A.639-40,642,651-52,657,733-34,738-43,799-802,810-11,814,956-58. In 2001, Hatfill submitted to his college alumni magazine an article describing himself as "a specialist in biological warfare and its defense," along with a photograph depicting him in a bio-safety suit. J.A.533-34,1374-75. Government agencies sought Hatfill's advice on biodefense projects because he was, according to a Pentagon official, the "ultimate biological weapons expert." J.A.1572-74.

In August 2001, weeks before the first anthrax mailing, the government suspended Hatfill's security clearance because "there is a reasonable basis for concluding that [his] continued access to classified information poses an imminent threat to the

national interest." J.A.1575-76. The suspension came after Hatfill failed four sessions of CIA polygraphs "based on the issue of foreign influence" and his "apparent lack of candor." J.A.1577-78,1586-88.

B. Hatfill and the Attacks

Following the attacks, the press sought out Hatfill for his self-proclaimed expertise about the mailings and his views about likely perpetrators. J.A.665,1610-11,1673,1677-81. In October 2001, *The Washington Times* republished the 1997 column featuring Hatfill's discussion about releasing anthrax in public buildings. J.A.255,340-41. Then, accompanied by "a colleague from the U.S. State Department," Hatfill was interviewed by an ABC reporter, "tried to explain how difficult it was to make anthrax," and advocated the position that the attacks were not of "domestic" origin." J.A.665.[2]

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[2] The Petition attempts to explain away this undisputed evidence by asserting that "ABC News sought out Hatfill in an unsuccessful attempt to get him to agree to an interview so that they could confront him." Pet.5. This assertion is unaccompanied by any citation, and for good reason – there is no record evidence to support it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990) (Court may not rely on evidence "'not in the record of the proceedings below'"). In the Fourth Circuit, Hatfill attempted to supplement the record with material neither generated during discovery nor otherwise in evidence in the district court. Not only did the Fourth Circuit *deny* that motion, *see* Order (7/19/07); 4TH CIR. R. 30(c), but the proffered evidence revealed that Hatfill freely offered his views to ABC that the attack "was all Saddam Hussein and Iraq and he could prove it" *and* discussed becoming an ABC "news consultant." Motion Opp'n (7/13/07) at 4-5.

In October 2001, Hatfill and several others visited a forty-acre property in rural Virginia. J.A.559-62,1380-87,1612-28,1630-39,1643. The property includes a three-bedroom house and guest cabin, which are not visible to passersby. *Id.* While there, Hatfill "answer[ed] questions about the ability to process anthrax," and the group discussed Cipro and whether Hatfill could provide it. J.A.1635-36,1641-42. Hatfill had been to the property at least a dozen times. J.A.694-703,1617-18.

Hatfill began taking Cipro in early September 2001, before the first mailing, and did so through November. J.A.542-58,1644-50. Although he is not licensed to practice medicine in the U.S., Hatfill dispensed Cipro to at least four people in late 2001. J.A.538-39,713-18,1653,1655. In addition to giving it "to people who have visited [him]," J.A.953, Hatfill dispensed Cipro from a stock kept in the trunk of his car. J.A.745-47.

After the attacks, Hatfill told a colleague he could make dry anthrax of the same type without access to a substantial laboratory "because I know what I'm doing." J.A.1602-09.[3] In May 2002, SAIC held a "Weapons of Mass Destruction Conference" in Washington and publicized Hatfill's appearance there as a featured speaker. J.A.1670-71.

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[3] "Wet" anthrax can be safely dried on a small scale and a skilled person can handle it in a home laboratory with an over-the-counter mask and antibiotics. J.A.749-52.

C. Hatfill and the Investigation

Shortly after the attacks, the FBI released a profile indicating the perpetrator had a scientific background, took steps to protect his safety through vaccine or antibiotics, and had access to anthrax and expertise in refining it. J.A.208-11. Working from the profile, the FBI developed a list of people who could have committed the attacks and investigated these "persons of interest." J.A.213C-214. The FBI identified Hatfill as such a person and interviewed him in December 2001. J.A.215. In January 2002, Hatfill took an FBI-administered polygraph, which "involved more than one test sequence." J.A.1656. He concedes he took "at least" one polygraph and FBI records reference the "results of" a "second polygraph." J.A.224,954.

Early in 2002, the FBI asked the American Society for Microbiology for help in finding the perpetrator, described as a "single person" who "has or had legitimate access to select biological agents at some time." J.A.237-38. The FBI asserted "[i]t is very likely that one or more of you know this individual" and invited scientists to bring "all relevant information, no matter how insignificant it may seem . . . to the attention of the investigators." *Id.*

Barbara Rosenberg, a molecular biologist who headed a working group on bio-weapons for the Federation of American Scientists, developed a similar profile. J.A.345-59. She posted it on the Federation's website and gave presentations about it at Princeton's Woodrow Wilson School and at the

Biological Weapons Convention in Geneva. J.A.256-58. Following the attacks, she was frequently quoted in the press as a bio-weapons expert. *Id.* In June 2002, with the FBI present, Rosenberg briefed the staffs of two senators who received anthrax-laced letters and "made clear . . . that her suspicions rested on Dr. Hatfill as the person most likely responsible for the mailings." J.A.151-52.

By early 2002, press reports began to focus on Hatfill, without identifying him by name. J.A.258-59. Those reports included a February 19 article in the Newark *Star-Ledger*, which drew "a likely portrait of the perpetrator as a former Fort Detrick scientist who is now working for a contractor in the Washington, D.C. area." J.A.395. An article in *The Washington Times* on February 25 described the FBI's prime suspect as a "former scientist" at USAMRIID who "is now employed as a contractor in the Washington area," and a March 2002 article in *The New Yorker* hypothesized that the perpetrator was a "a middle-aged man who had worked at [USAMRIID] . . . was familiar with the method of weaponizing anthrax devised by William Patrick . . . [and] now works for a Washington-area subcontractor to the U.S. biological-weapons program." J.A.374-75,400-01. In March, Hatfill received an email from a medical school classmate, who reported that Hatfill had "becom[e] quite the celebrity recently" and that the classmate had been "'plagued' by [South African television] and the Baltimore Sun regarding [Hatfill's] alleged

involvement with that large anthrax outbreak in Zimbabwe." J.A.1682.[4]

During this period, Hatfill continued to engage the press. For example, Baltimore *Sun* reporter Scott Shane contacted Hatfill twice in February 2002 because he "had presented himself to the world as a biodefense expert," and Shane "was talking to all the bioterrorism experts that [he] could about the case," and also because Shane "had been told that [Hatfill] . . . was among the scientists and others who had been questioned by the FBI." J.A.1673. In February 2002, *The Sun* published an article quoting Hatfill (though not by name). J.A.398,530-32,1677-81.

On June 25, 2002, the FBI searched Hatfill's apartment. The search was televised live and generated massive news coverage. J.A.152-53. Contrary to the Petition's representation that "nothing incriminating was found," Pet.7, the FBI seized "notes re: anthrax, milling and munitions," a "notebook w/ handwritten notes re: dissemination and Pentagon, WTC, White House and Congress,"

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[4] The Petition's most significant misrepresentation may be its stated premise that the "[w]hen The Times began publishing Kristof's articles, Hatfill was a virtual unknown. But Kristof made Hatfill infamous." Pet.1.; *see also* Pet.2 (asserting Hatfill's "virtual anonymity at the time of the attacks"). In fact, Hatfill had become a central figure in the investigation, and in press reports about it, long before Kristof first wrote about "Mr. Z" in July 2002 or discussed him (albeit not by name) that May. Indeed, at his first press conference in August, Hatfill blamed his predicament on Rosenberg, the FBI, and *other* news organizations and journalists, *not* including either Kristof or the Times. J.A.1717-21.

and a spinner flask of anthrax simulant. J.A.1686-87. Hatfill has characterized the press coverage that followed as a "media frenzy." J.A.526.

For example, before the first column at issue was published on July 2, 2002, *The Sun* had identified Hatfill by name and reported, *inter alia*, that he had the necessary skills and access to anthrax to have carried out the attacks and had "spoken frequently on the bioterrorist threat, stressing how easy it would be for a terrorist to brew a deadly bioagent in his kitchen." J.A.413-15. The Hartford *Courant* published an extensive article identifying Hatfill on June 26. J.A.419-22. The following day, it reported that government "scrutiny of Hatfill appears to be intensifying." J.A.423-26.

On August 1, 2002, the FBI searched Hatfill's car and apartment and his girlfriend's condominium. J.A.215. Once again, the media covered these searches. J.A.157-58. The FBI seized a container of Cipro hidden within a coffee jar in Hatfill's girlfriend's apartment, and told her that it had "conclusive evidence" from specially trained bloodhounds that Hatfill had killed five people. J.A.241B-C,243-44,1699,1703. [5]

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[5] The Petition contends that Kristof recklessly reported that "'[s]pecially trained' bloodhounds" had "'responded strongly' to Hatfill," even though another journalist had "debunked the 'bloodhound evidence'" five days earlier. Pet.29. First, it is undisputed that the FBI *did* widely disclose the bloodhound information. J.A.172-73,186-87,241B-C,243-44. Second, the FBI's information had already been prominently reported in *Newsweek* and repeated in multiple newspapers and on national television well before Kristof's column. Third, the

Throughout this period, Hatfill had several additional meetings with reporters, including dinner with then-Times reporter Judith Miller, lunch with Ted Koppel, and lunch with Jim Stewart of CBS News. J.A.665-66. He gave formal interviews to two other reporters and attended "meetings" with journalists from *The Washington Post*, National Public Radio, *The Los Angeles Times*, NBC News, United Press International, and *The Washington Times*. J.A.666.

On August 6, 2002, Attorney General Ashcroft announced on national television that Hatfill was a "person of interest." J.A.161,246-46B. On August 11 and 25, 2002, Hatfill held widely publicized press conferences to protest his innocence. J.A.261-63,1701-21. Thereafter, he filed a lawsuit against the federal government, alleging that his reputation was irretrievably damaged because the FBI disseminated to the press information from government files indicative of his guilt, including the facts that he "possesse[d] the expertise to handle deadly pathogens," "had access to the Ames strain of anthrax at Fort Detrick," "had received prescriptions for Cipro," and had "failed polygraphs." J.A.156,165,168,171,247-49.

"bloodhound evidence" had not been "debunked" – the referenced article purports only to report "doubts about the significance" of the information, J.A.436-41, and the press continued to report the FBI's claims thereafter, J.A.184-90. Fourth, Kristof's passing reference to bloodhounds expressly diminished their significance as "obscure." J.A.436-41.

On June 27, 2008, the government agreed to pay Hatfill more than $5.8 million in settlement of his claims. On August 6, the FBI announced that Dr. Bruce Ivins, another scientist employed at USAMRIID who had taken his own life on July 29, had sent the anthrax letters. On August 8, the government publicly exonerated Hatfill.

D. Kristof's Columns

Kristof is a columnist. His work appears on the "Op-Ed" page, opposite the newspaper's editorials. He received his second Pulitzer Prize in 2006, for what the Pulitzer Committee described as "graphic, deeply reported columns that, at personal risk, focused attention on genocide in Darfur and . . . gave voice to the voiceless in other parts of the world." J.A.250-51, 263,280-81.

In late 2001, Kristof came to believe that bioterrorism constituted a significant, ongoing threat to the United States and that apprehending the anthrax mailer was vitally important to our national security. As the investigation dragged on, Kristof became increasingly concerned the FBI was not doing all it should.[6] He wrote a series of columns on

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[6] The Petition begins by quoting a January 2002 column in which Kristof stated, "'I think I know who sent out the anthrax,'" Pet.1 (quoting App.66a), but neglects to disclose that the column addresses only Kristof's belief that the mailer was more likely an American scientist than a foreign terrorist, as was widely assumed at the time, and *disclaims* any knowledge of the specific perpetrator's identity.

the subject. J.A.264-65. Four of them, published in July and August 2002, are at issue.[7]

The theme of the first column, published July 2, was that the FBI's failure to find the perpetrator "continues to threaten America's national security." The column criticized the FBI for its "lackadaisical" attitude and cited several examples, including that the bureau permitted stocks of anthrax to be destroyed before they had been genetically analyzed, delayed review of anthrax strains stored at various labs, and failed to "systematically polygraph scientists" at two labs where anthrax was stored. In this context, the column held up the FBI's probe of an otherwise unidentified "Mr. Z" as another example of the investigation's shortcomings. Specifically, Kristof noted that, "[s]ome in the bio-defense community" thought Mr. Z was "a likely culprit," and chastised the FBI for failing to investigate him thoroughly. Nevertheless, the column emphasized that Mr. Z "denie[d] any wrong-doing," and that his friends were "heartsick at suspicions directed against a man they regard as a

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[7] Much of the "evidence" cited in the Petition relates to a May 2002 column published more than a year before Hatfill initiated this litigation in state court. His initial pleading contains no reference to the May column and affirmatively alleges that Hatfill's claims are directed only to columns published "[b]eginning July, 2002." J.A.2033-34. Hatfill undoubtedly framed his pleading in this manner because he recognized that any claims arising from the May column were already time-barred when it was filed and could not later be resuscitated when he voluntarily dismissed his state court action and re-filed it in federal court. VA. CODE §8.01-247.1.

patriot." The column urged the FBI either to "go after [Mr. Z] more aggressively" or "exculpate him and remove this cloud of suspicion." It asserted that deficiencies in the investigation of Mr. Z were "part of a larger pattern" of government inattention to the bioterrorism threat. J.A.275-76,406.

The second column, published July 12, again criticized what Kristof termed the FBI's "unbelievably lethargic" investigation. The column described earlier anthrax hoaxes the FBI had ignored and criticized the bureau for not investigating letters sent to media organizations in 1999. Kristof briefly referred to "Mr. Z," noting that he made public comments about the B'nai B'rith hoax. The column identified Mr. Z as a "bio-defense insider" and someone who "intrigues investigators" but who "denies any involvement with the anthrax attacks." J.A.276,407.

On July 19, Kristof's column criticized lax security at bio-weapons facilities and inadequate management of pathogens in the U.S. bio-defense program. Kristof described instances in which Ebola and other pathogens had gone missing from U.S. labs and urged Congress to investigate. He noted in passing that his interest in bio-security had been piqued by his research into the still-unidentified Mr. Z, who had been hired to work on deadly viruses at USAMRIID despite having "spent years in the armed forces of Rhodesia and apartheid South Africa." The column noted that Mr. Z had been "interviewed four times by the FBI" and had his home "searched twice in connection with the anthrax investigation," but

emphasized that USAMRIID personnel "are dedicated patriots who could earn more in the private sector" and "risk their lives working with deadly germs to improve vaccines for American troops." J.A.276-77,408.

The final column was published August 13, after the Attorney General publicly identified Hatfill and he held his first press conference. It began by disclosing that "Mr. Z" was Hatfill, who "over the weekend" had "named himself." Kristof underscored the importance of not jumping to conclusions about Hatfill, warning "[i]t must be a genuine assumption that he is an innocent man caught in a nightmare" and that "[t]here is not a shred of traditional physical evidence linking him to the attacks." Nevertheless, the column defended what Kristof considered the FBI's legitimate interest in investigating Hatfill, given "his expertise in dry biological warfare agents," his access to labs "where anthrax spores were kept," and the animus he had shown "to some federal agencies." Even so, Kristof emphasized his hope that "the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him." In Kristof's view, the FBI's investigation of Hatfill raised two "larger issues" – the bureau's "initial slowness in carrying out the anthrax investigation" and "the need for much greater care within the U.S. bio-defense program." J.A.277,409.

In researching these columns, Kristof reviewed many previously published news reports. These reports recounted that Hatfill had been questioned

by the FBI more than once; had been vaccinated against anthrax; had taken Cipro; had access to labs where it was stored; had knowledge about anthrax's use as a weapon; had strong views about the bioterrorism threat; had agreed that "his background naturally drew the FBI's attention;" had spoken frequently about possible bio-terror events; had access to a "remote location;" and lost his security clearance after he failed a polygraph. J.A.265-69,410-35.

Kristof also reviewed hundreds of pages of documents. Among them were several versions of Hatfill's résumé, which touted his "[w]orking knowledge of the former U.S. and foreign BW programs, wet and dry BW agents" and boasted that he had "clearance to conduct research on Biosafety Level 3 pathogens (Plague, Anthrax and Monkeypox)." These representations indicated to Kristof that Hatfill had expertise in handling pathogens, including anthrax. J.A.269-70,447-73.

In addition, Kristof reviewed the letter Hatfill had sent to organizers of the "Super Terrorism" conference and the text of the presentation he gave on "Emerging Threats of Biological Terrorism." Kristof read the report Hatfill had commissioned from Patrick describing anthrax sent through the mail and detailing the characteristics of weaponized dry anthrax. These documents further contributed to Kristof's understanding that Hatfill was an expert in bio-weapons, including anthrax. J.A.270,282,474-503.

Kristof also consulted dozens of sources, including microbiologists, bio-defense experts, and Hatfill's friends and co-workers. J.A.270. None expressed any doubt that Hatfill had substantial experience with bio-weapons, particularly anthrax. J.A.274. For example, Dr. Richard Ebright, a microbiologist with multiple degrees from Harvard University, J.A.271-72, told Kristof that, "[b]ased upon information in [Hatfill's] C.V., as well as the record of his publications," he believed Hatfill "did have the means to prepare bacterial culture and to dry bacterial culture" and "to prepare a highly aerosolized dried powder." J.A.1734. Kristof also reviewed materials written and compiled by Rosenberg which indicated that the person she had focused on (who Kristof knew to be Hatfill) had "the right skills, experience with anthrax, up-to-date anthrax vaccination, forensic training, and access to USAMRIID and its biological agents through 2001" as well as "access to a conveniently-located but remote location." J.A.270-71,345-59. Through her writings and their telephone conversations, Kristof learned that Hatfill had the ability to make anthrax, access to anthrax spores, a possible motive for the attacks, access to a "remote location," and that he gave Cipro to people who visited him. J.A.271.[8]

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[8] The Petition asserts that Rosenberg's testimony about what she told Kristof "'contradicts'" his own. Pet.28. The otherwise unexplained "contradiction" is, however, another misstatement of the evidence. Specifically, Hatfill asserted below that Rosenberg "denied *telling* Kristof that Hatfill could make first-rate anthrax." Reply Br.39 (emphasis added). Rosenberg actually testified that, although she did not recall

Hatfill's friends told Kristof they did not believe he was the mailer, and their sentiments were included in the columns. But not even they suggested that Hatfill was anything other than a gifted bio-weapons researcher with expertise in anthrax. J.A.274.

REASONS FOR DENYING THE PETITION

I. "Limited Purpose" Public Figure

The Petition asserts that the Fourth Circuit found Hatfill to be a "limited purpose" public figure without identifying the "particular" public controversy that gave rise to the defamation, as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), and instead applied a standard that conflicts with *Gertz* and with the decisions of several circuits.[9] These contentions constitute a plain misstatement of the Fourth Circuit's decision, the relevant post-*Gertz* case law, and the record evidence.

First, the Fourth Circuit did not, as the Petition asserts, set aside this Court's requirement that a limited-purpose public figure voluntarily participate in the "particular" public controversy that gave rise to the defamation at issue. *Gertz*, 418 U.S. at 345.

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making such a statement to Kristof "orally," she was confident he had learned precisely that information from "something [she] wrote" and to which she had referred him. J.A.1764.

[9] The district court also found that Hatfill was a public official. *See* App.40a-41a. The Fourth Circuit did not reach this issue, *see* App.11a, which provides an alternative basis for affirming the Fourth Circuit's decision, *see* S. CT. R. 15.2.

See Pet.i (question presented is "[w]hether the court of appeals erred by declining to identify the 'particular controversy giving rise to the defamation'"). The Fourth Circuit actually began its analysis by citing to and embracing the operative language in *Gertz*:

> [I]n contrast to a public official or an all-purpose public figure, either of whom must always meet the actual malice standard, a "limited-purpose public figure," one who has "thrust [himself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved," *Gertz*, 418 U.S. at 345 (emphasis added), must show actual malice only when alleging defamation with regard to the particular controversy into which he has inserted himself.

App.10a. The Fourth Circuit then "address[ed] the nature of the 'particular public controversy' that gave rise to the alleged defamation to determine whether Dr. Hatfill thrust himself into *that* controversy." App.19a (citing *Gertz*, 418 U.S. at 345).[10] It did not, in words or substance, purport to "look[] broadly at *every* issue raised by the articles in which the

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[10] The Petition cites no case, because there is none, that purports to put the weight on this Court's use of the word "particular" in *Gertz* that the Petition asserts it should bear. *See, e.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980) (distinguishing between those "persons who are public figures for all purposes and those who are public figures for *particular* public controversies") (emphasis added).

defamation happened to appear" and then "examine[] whether the plaintiff voluntarily participated in debate on any such issue." Pet.14.[11]

Second, the Fourth Circuit's decision in no sense conflicts with the law of any other circuit. There is no suggestion in either *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), or in decisions of other circuits, that they have parted company with the Fourth Circuit in construing the *Gertz* standard in this context. Similarly, there is no suggestion in the Fourth Circuit's opinion that it is taking or has previously taken a different route to identifying limited purpose public figures than the D.C. Circuit did in *Waldbaum*. To the contrary, the Fourth Circuit has consistently endorsed the D.C.

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[11] The Petition's assertion that the Fourth Circuit's "approach is irreconcilable with *Gertz*," is also based on its false *assumption* that the disputed article in *Gertz* "surely included, for example, discussion of the perceived threat from communism generally" which, according to the Petition, rendered it significant that this Court did not assess whether "Gertz ever spoke or wrote on communism." Pet.14-15. The article at issue in *Gertz* did not address "the perceived threat from communism generally"– it focused tightly on the shooting of a "hoodlum" by a decorated police officer and his subsequent conviction, ostensibly as a result of a communist-inspired war on local police. *See* Alan Stang, *Frame Up: Richard Nuccio and the War on Police*, AMERICAN OPINION 1 (April 1969). As this Court noted, *see Gertz*, 418 U.S. at 352, there was no evidence that, beyond his legal representation of the victim's family, Gertz had taken any public position with respect to the case specifically, or the broader issue of the alleged "conspiratorial war being waged by the Communists against the police in general." *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

Circuit's "two-part inquiry for determining whether a defamation plaintiff is a limited-purpose public figure. First, was there a particular '*public* controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?" *Foretich v. Capital Cities/ABC*, 37 F.3d 1541, 1553 (4th Cir. 1994) (citations omitted); *id.* at 1554 (citing *Waldbaum*); *see Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 669 (4th Cir. 1982) (same); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991) (same).[12] The Fourth Circuit has *not*, in this or any other case, purported to dispense with the requirement that, in determining whether a plaintiff is a limited purpose public figure, a court must first "address the nature of the 'particular public controversy' that gave rise to the alleged defamation." App.19a (quoting *Gertz*, 418 U.S. at 345).[13]

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[12] To the limited extent it has modified the *Waldbaum* approach, the Fourth Circuit has made it *more* difficult for a plaintiff to become a public figure. *See, e.g.*, *Foretich*, 37 F.3d at 1554 n.11 (explaining Fourth Circuit's comparatively "stringent" approach).

[13] Neither have the Second or Third Circuits. *See Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136 (2d Cir. 1984) ("question in each case is what is 'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation'") (quoting *Gertz*, 418 U.S. at 352); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082-83 (3d Cir. 1985) (explaining that "the alleged libel involves a public controversy," – *i.e.*, "illicit drug activities" – and that it is therefore "necessary to examine the nature and extent of

Third, the Petition's disagreement with the Fourth Circuit rests not on any conflict with this or any other court's decisions, but rather with its conclusion that "the particular public controversy" at issue "is the threat from bioterrorism and the nation's preparedness to handle that threat, with the anthrax attacks as the specific example that opened the debate to a greater discussion." App.21a-22a. *See* Pet.12 ("Rather, the controversy was about who committed the 2001 anthrax murders and whether law enforcement authorities were doing enough to apprehend the criminals."). Not only is such disagreement with the application of law to fact an inappropriate basis on which to premise a request for review in this Court, the Petition is demonstrably unreliable in its rendition of the record evidence.

Both courts below recognized that "the controversy into which Plaintiff thrust himself can be properly defined as the government's handling of the bioterrorism threat, and more specifically, its handling of the anthrax investigation." App.44a. These twin controversies are both the express subject

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Marcone's participation in it"). The notion that there is "one 'limited purpose public figure' test that respects this Court's balance and an equally influential one that does not," Pet.24, is pure fiction – neither *Lerman* nor *Marcone* (nor any other cases decided in either circuit) seeks to distance itself from *Waldbaum*. *See Wayment v. Clear Channel Broad., Inc.*, 116 P.3d 271, 282-84 (Utah 2005) (relying interchangeably on *Waldbaum*, *Lerman*, and *Foretich* in evaluating plaintiff's status); 1 ROBERT D. SACK, SACK ON DEFAMATION – LIBEL, SLANDER & RELATED PROBLEMS § 5.3.3 at 5-24 n.147 (3d ed. 2006) (explaining that *every* circuit has adopted similar formulations).

of Kristof's columns and the focus of Hatfill's purposeful activity prior to their publication. Each column took on the "larger issue[]" that Kristof said deserved increased public attention following the mailings: "the need for much greater care within the U.S. biodefense program." J.A.409. Their discussion of the investigation, and Hatfill's role in it, was offered in support of Kristof's thesis that the FBI's "lackadaisical ineptitude in pursuing the anthrax killer *continues* to threaten national security." J.A.406.

The record contains overwhelming, undisputed evidence that Hatfill purposefully injected himself in the larger controversy that gave rise to the defamation – *i.e.*, the adequacy of the government's response to the bioterrorism threat – as well as the narrower controversy he identifies – *i.e.*, who committed the murders. The record overflows with Hatfill's efforts to shine a spotlight on himself and his views about the bioterrorism threat, from multiple appearances in the media, to countless public speeches, to the publication of articles about the subject, to the completion of a novel illustrating his concerns. J.A.282-339,514-20,530-32,572-87,593,603-05,615,617-37,653-92,890-951,1673-75,1677-81,1735-38.[14] And, the Petition's only

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[14] The Petition's assertion that, "[i]n sum, Hatfill's public appearances before the anthrax articles *included* two radio appearances, one non-speaking television appearance, and quotations in two print media articles," Pet.4 (emphasis added), as well as the accompanying discussion, is carefully crafted to obscure the *entirety* of Hatfill's efforts to thrust himself into public debate. *See also* Pet.17 (inaccurately stating that Hatfill

rejoinder to the substantial evidence that Hatfill voluntarily engaged the press on the subject of who committed the attacks long before Kristof's columns is based on inadmissible "evidence" that is nowhere in the record. *See* note 2 *supra*.[15] Hatfill is bound by his *sworn* concession that, in the wake of the attacks, he and "a colleague from the U.S. State Department" set out to persuade ABC "how difficult it was to make anthrax" and that the attacks were not of "domestic origin." J.A.665,1748. Similarly, the Petition cannot wish away Hatfill's statements to *The Sun* following the attacks in his capacity as a bioterrorism expert, J.A.413-15, his publicized appearance as a featured speaker at a May 2002 conference on weapons of mass destruction, or the undisputed evidence of his apparently insatiable appetite for lunches, dinners and other voluntary interactions with reporters following the attacks. J.A.665-66,1670-71.

"had *one* minor publication in a specialized trade magazine") (emphasis in original).

[15] The Petition incorrectly asserts that the Fourth Circuit's "reliance on Hatfill's contacts with the press after the anthrax attacks" conflicts with *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), ostensibly because "'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.'" Pet.16-17 (quoting *Hutchinson*, 443 U.S. at 135). Lest there be any confusion, well before Kristof wrote the columns at issue or even the time-barred May 2002 column, Hatfill was both the subject of multiple press reports about the attacks and voluntarily offered to the public his views concerning who committed them. *See* pp.7,11 *supra*.

In short, Hatfill's long history – beginning in 1996 and extending at least through early 2002 – of affirmatively courting the public and the media to trumpet his expertise concerning bioterrorism, the threat it posed, and his views concerning the attacks rendered him a public figure with respect to the public controversy engendered by bioterrorism generally and by the September 2001 bioterrorism incident specifically. *See* Pet.6 (conceding Hatfill was so well known that "[m]any readers recognized" him as "Mr. Z" described in columns).[16] Hatfill was not off the mark when he asserted below that the relevant question is "did the plaintiff's participation in a particular public controversy somehow lead to or prompt or cause or invite the defamation?" Reply Br.15. In this case, the answer is undoubtedly "yes" – Hatfill's purposeful conduct, which included showing the world how *he* could whip up a biological weapon in his kitchen and persistently expressing his frustration with the government for not treating more seriously the threat that someone would do so, "prompted," "caused," and "invited" Kristof to question the FBI's failure to subject him to more serious scrutiny in the wake of the attacks.[17]

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[16] Holding that a plaintiff such as Hatfill is a public figure does not, as the Petition repeatedly asserts, leave him or others to be defamed "with impunity." Pet.2,13,24. As the Fourth Circuit recognized, a public figure may secure both compensatory and punitive damages if a defamatory falsehood about him is published with constitutional malice. App.7a,23a.

[17] For the same reason, the putative plaintiff in the Petition's hypothetical would surely be a public figure for purposes of an article reporting that he – an outspoken critic of

II. Constitutional Malice

The Petition contends that the Fourth Circuit improperly "held" that, unless a defamatory charge is "'completely fabricated,'" a public figure plaintiff cannot establish constitutional malice. Pet.25 (quoting App.25a). This contention is, to borrow a phrase, "completely fabricated," as is the Petition's suggestion that the record evidence would allow a reasonable jury to find constitutional malice with convincing clarity.

The Fourth Circuit's use of the phrase "completely fabricated" follows its accurate recitation of this Court's definition of constitutional malice – *i.e.*, publication of a defamatory statement "'with

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gun control – had shot innocent shoppers, regardless of whether he had ever mounted the public rostrum to advocate random murder and especially if, like Hatfill, he had publicly offered his views about the specific crime of which he was suspected. This would be so regardless of whether the case was litigated in the Fourth Circuit, the D.C. Circuit, or any of the others with which the decision below allegedly conflicts. *E.g.*, *Tavoulareas v. Piro*, 817 F.2d 762, 773-74 (D.C. Cir. 1987) (plaintiff had participated in broad public controversy regarding the general "state of the oil industry," while challenged article addressed allegations he engaged in nepotism); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1277, 1280 (D.C. Cir. 2003) (plaintiff participated in broad public controversy regarding "women in combat," while alleged defamation questioned whether she was "an incompetent combat pilot"); *O'Donnell v. CBS Inc.*, 782 F.2d 1414, 1416-17 (7th Cir. 1986) (cited at Pet.19) (plaintiff participated in broad public controversy regarding "disposal of toxic waste and the EPA's failure to enforce its regulations," while challenged article addressed his firing from position as television executive).

knowledge that it was false or with reckless disregard of whether it was false or not.'" App.7a (citation omitted); *see also id.* ("[t]he standard requires that the defendant have a 'subjective awareness of probable falsity'") (citing *Gertz*, 418 U.S. at 335 n.6; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). The phrase is contained in a paragraph explaining that, although constitutional malice "requires 'much more than a failure to exercise ordinary care,'" there are several *alternative* ways in which a public figure can prove it, including through:

> evidence of the "publication of a *completely* fabricated story, ***or*** of one based entirely on an unverified anonymous telephone call; ***or*** publication where there are obvious reasons to doubt the veracity of the informant."

App.25a (quoting *Ryan v. Brooks*, 634 F.2d 726, 732 (4th Cir. 1980) and citing *St. Amant*, 390 U.S. at 732)) (emphasis in boldface added). The Fourth Circuit's description of the various ways a plaintiff may go about establishing constitutional malice is derived directly from *St. Amant*:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. . . . Professions of good faith will be unlikely to prove persuasive, *for example*, where a story is fabricated by the defendant, is the

> product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

390 U.S. at 732 (emphasis added).

Neither the quoted passage nor any other language in the Fourth Circuit's opinion contains the slightest suggestion that it articulated or applied the "'completely fabricated' rule" described in the Petition. Pet.25-38.[18] Not surprisingly, there is not a single case cited in the Petition that purports either to embrace or reject such a "rule." Nor is there any suggestion in the Fourth Circuit's opinion that it "ignored" or deemed "irrelevant" any admissible evidence proffered by Hatfill, or that it declined to consider the "'cumulative impact'" of such evidence in the "aggregate," much less that it did so because it had adopted a "rule" that only evidence of a "completely fabricated story" would suffice. Pet.26,37.

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[18] Contrary to the Petition's contention, *see* Pet.31, in its brief below (at 58), the Times, like the Fourth Circuit, cited the quoted language from *Ryan* as one of a number of examples, derived from *St. Amant*, of the kinds of evidence that could support a finding of constitutional malice.

In addition, the Petition's recitation of the record evidence with respect to Kristof's state of mind, including evidence that the Fourth Circuit allegedly "ignored," is neither reliable nor complete. For one thing, it is undisputed that, when he wrote the columns, Kristof knew:

- At least five bio-weapons experts had identified Hatfill to the FBI as someone who should be investigated carefully (J.A.266-67,356-59,416-18);
- Several news organizations had reported that Hatfill had access to labs where anthrax was stored; had knowledge of how to weaponize anthrax; had lost his security clearance after failing a polygraph exam; and had access to a "remote location" where anthrax could be refined (J.A.265-69,410-35);
- The FBI and Rosenberg, the chair of a working group convened by the American Federation of Scientists, had both issued profiles of the mailer with many characteristics matching what Kristof knew about Hatfill (J.A.255-56,342-59); and
- Hatfill's own résumés claimed expertise in "dry" bio-warfare agents, tenure in government facilities where anthrax research was conducted, and many publications on bioterrorism, including anthrax (J.A.269-70,282,326-39,447-73).

For another, there is no evidence in the record that Kristof "fabricated" anything. The Petition relies on the alleged "fabrication" of four published statements to demonstrate that "Kristof either doubted the truth of his assertion that Hatfill was the anthrax murderer or recklessly made claims supporting that assertion." Pet.26-29. No amount of hyperbole can transform Kristof's newsgathering with respect to these statements, three of which were never alleged to be false in Hatfill's Complaint,[19] into clear and convincing evidence that, at the time he wrote his columns, Kristof "in fact entertained serious doubts," *St. Amant*, 390 U.S. at 731, about the truth of the only defamatory accusation Hatfill placed at issue – that "Kristof's columns falsely accused him of committing the anthrax murders," Pet.6.

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[19] These statements – concerning the "safe house," "alias," and "bloodhounds" – were first alleged to be false after discovery closed. *See Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993) (in Fourth Circuit, plaintiff may not "belatedly rely" on statements "not labeled as false in the complaint"); *Veilleux v. NBC*, 8 F. Supp. 2d 23, 35-36 (D. Me. 1998) (defamation plaintiff may not on summary judgment dispute "entire statements *not* alleged in the complaint," lest defendant be unfairly forced "to prepare a defense to virtually every statement made" in publication); *see generally Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (purpose of federal pleading rules is to "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"). This effort at sandbagging – not the adoption of a "rule" requiring "complete fabrication" – explains why the Fourth Circuit "did not address any of the evidence" on which the Petition now relies. Pet.29.

It is, for example, undisputed that Kristof was both told about Hatfill's access to the "isolated residence" by Rosenberg and read about it in other publications before referencing it – in the form of a question – in one of his columns. J.A.356-59,416-18,1768-72,1777-78,1793-97. It is equally undisputed that Cipro was discussed by Hatfill there and that he not only was taking it himself, but dispensed it to others from the trunk of his car. J.A. 542-58,745-47,1387,1628,1630-33,1644-50,1655.[20] It is also undisputed that the FBI said it used bloodhounds as Kristof described, J.A.172-73,241B-C,243-244, and that he read a lengthy article in *Newsweek* relating the same facts he repeated, J.A.269,442-46. *See also*

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[20] In the face of this undisputed evidence, the Petition's effort to equate Kristof's failure to locate the property's owner with the failure of the newspaper in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), to interview Patsy Stephens, the one person who could corroborate her sister's defamatory claims, is unpersuasive. *See* Pet.33. In *Harte-Hanks*, there was substantial evidence that Stephens' sister, the newspaper's *only* source, was known to be unreliable. 491 U.S. at 689 n.36. In stark contrast, Kristof read about the "isolated residence" in several reputable publications, did not know who owned the property, J.A.416-18,1768-72, and was told about it by Rosenberg, "an expert in the field of biological weapons [who] had been called upon by the FBI to discuss the anthrax investigation," App.25a. *See St. Amant*, 390 U.S. at 732 (for purposes of constitutional malice, a duty to investigate arises where there are obvious reasons to doubt source's credibility or source's information is inherently improbable). Nor does the relevant column "fabricate" an accusation that the isolated residence was a "safe house." Rather, it wondered *whether*, in the form of a *question*, the residence "*may be*" a "safe house." J.A.52 (emphasis added).

p. 12 *supra*. And, it is undisputed that Kristof's research assistant investigated the "alias" issue using electronic databases and assured Kristof, in writing, that Hatfill "definitely has at least one alias, the hatfield one, based on the ss# and address in Florida. this I am positive about." J.A.1938-39. *See* J.A.538 (Hatfill also used another alias).

Finally, despite the Petition's representation to the contrary, *see* Pet.27, Hatfill was unable to carry his burden of proving the material falsity of the published statement that he "failed three successive polygraph examinations." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).[21] His effort to do so consisted entirely of citation to his own press release that he "took one FBI polygraph examination and was *told* by the examiner that he passed." Pet.27 (emphasis added). Hatfill made no effort to secure from the FBI any evidence that would corroborate the truth of that statement, even though he presumably knows who gave him the polygraph exam he concedes he took

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[21] Although the Fourth Circuit did not reach the issue, the district court concluded that Hatfill had failed to carry his burden of proving the substantial falsity of *any* of the specific statements that allegedly contributed to the single defamatory meaning he attributed to the columns – including that Hatfill had "access to Fort Detrick labs where anthrax spores were kept;" "expertise in dry biological warfare agents;" and "access" to an "isolated residence." App.50a-53a (district court decision). The Petition's repeated assertions that such statements are "false," *see, e.g.*, Pet.6-7. cannot be squared with either that holding or the record evidence.

and where to go to obtain the actual results.[22] His own testimony about what the FBI allegedly said is inadmissible hearsay that "cannot be considered on a motion for summary judgment." *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *see also* FED. R. CIV. P. 56(e); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.19 (1970). On the other hand, the record contains significant, undisputed evidence that the FBI administered to Hatfill "*at least* one polygraph examination" that "involved more than one test sequence," J.A.215-16,954,1656, and that FBI records reference the "results" of a "second polygraph," J.A.224.[23]

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[22] The Petition's related contention that Kristof "fabricated" what the FBI told him about the polygraphs cannot be reconciled with his admission in his suit against the government that the FBI leaked to the media, in violation of the Privacy Act, the fact that he had "failed polygraphs." J.A.171.

[23] Hatfill argued below that the Times should not have secured summary judgment because it did not comply with a magistrate's order that it disclose the identities of two of the more than thirty sources on whom Kristof relied. Br.59. The district court rejected Hatfill's request for such a sanction, exercising its discretion to impose a different penalty that would "ameliorate th[e] prejudice" to Hatfill "without resorting to overly drastic measures." J.A.107. The district court's decision to permit the Times to seek summary judgment, provided it did not rely on its two confidential sources, was reviewable only for abuse of discretion. *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003). Hatfill does not now and did not in the Fourth Circuit contend that the district court acted arbitrarily, especially since his speculation in this Court about what he might have learned from these sources is inconsistent with his

Most importantly, the Fourth Circuit reasonably determined, based on its own "careful review of the record," App.24a, that none of the "evidence" on which the Petition relies, even if credited, can support the conclusion that the Times had serious doubts about the truth of the implication that Hatfill is the anthrax mailer, the only allegedly defamatory meaning that Hatfill attributed to the columns. App.23a. Put differently, even if a jury were to accept all of Hatfill's suggestions about additional steps Kristof *should have* taken before publication – investigating the isolated residence further, disclosing that the "alias" to which he referred was "Hatfield," being skeptical of the FBI's use of bloodhounds, or avoiding references to polygraphs, such a showing cannot, in the face of the "substantial [undisputed] evidence . . . that Kristof *actually believed* that Dr. Hatfill was the prime suspect," App.24a, reasonably be considered proof of "convincing clarity" that Kristof in fact entertained serious doubts about the truth of the implication that Hatfill perpetrated the anthrax attacks. *See* App.25a ("the evidence in this case, *'at best,'* reveals that

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concession elsewhere that the statements about which he complains were in fact leaked to the press by the FBI. J.A.171. *See Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (must be "cognizable prejudice" before unavailability of testimony from confidential sources can defeat summary judgment; "[m]ere speculation or conjecture about the fruits of such examination simply will not suffice"); *see also Hepps*, 475 U.S. at 779 (concluding that plaintiff's inability to secure testimony from newspaper's sources because of state shield law does not excuse plaintiff's failure to carry his burden of proving falsity).

Kristof 'did not know whether or not [Dr. Hatfill] was the anthrax mailer, but did believe that [Dr. Hatfill] was someone that [the] FBI should investigate more thoroughly'") (citation omitted).

If there were any doubt on this score, it was removed when Hatfill affirmatively asserted below, as an *undisputed material fact*, that "Kristof set out to prod the FBI because he believed Hatfill was the anthrax killer." J.A.1744. This is the antithesis of constitutional malice and amply supports the conclusion, reached by both the district court and a unanimous Court of Appeals, that "no reasonable jury could find that Kristof had a 'high degree of awareness' that Dr. Hatfill was *not* the anthrax mailer." App.24a (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

CONCLUSION

The Petition should be denied.

November 14, 2008

Respectfully submitted,

LEE LEVINE
Counsel of Record
DAVID A. SCHULZ
MICHAEL D. SULLIVAN
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
1050 17TH STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20036
TELEPHONE: (202) 508-1100
FACSIMILE: (202) 861-9888

Counsel for Respondent

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Supreme Court, U.S.
FILED
NOV 26 2008
OFFICE OF THE CLERK

No. 08-483

In the Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300
* *Counsel of Record*

November 2008

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In its opposition, The Times reargues the facts and ignores the conflicts with this Court's precedents and those among the circuits. With respect to the facts, The Times' largely fictional account is particularly misplaced because The Times obtained summary judgment and factual disputes must be resolved in Hatfill's favor.

Fundamentally, however, this petition is not about disputed facts, but about the Fourth Circuit's failure to apply proper legal standards. With respect to whether Steven Hatfill is a public figure, the lower court found it unnecessary to consider whether Hatfill thrust himself into the "particular" controversy concerning who committed the anthrax murders because, years earlier, Hatfill had criticized our country's lack of preparedness for a bioterrorism attack and Nicholas Kristof referenced that broader issue in his columns. The Times concedes, Opp. 27-28 n.17, that under the Fourth Circuit's approach an expert on any subject may be falsely accused of murder (absent actual malice) if the article accusing him addresses the broader issue on which he is expert. That holding eviscerates the "particularity" requirement established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

With respect to "actual malice," The Times refuses to defend the court of appeals' bizarre holding that a defamation plaintiff must establish that the false accusations at issue were "*completely* fabricated" in order to establish malice. Pet. App. 25a (emphasis by the court). This strange ruling prevented the lower court from even considering Hatfill's evidence of malice. But The Times defends the summary judgment

as if the court: (1) had actually considered all the evidence; and (2) were permitted to do so in the light most favorable to the *moving* party. The Times has nothing to say in response to our showing that the decision below is contrary to this Court's decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), and conflicts with other circuit court cases. *See Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981); *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992); and *Tavoulareas v. The Washington Post Co.*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*).

Now that the Department of Justice has exonerated Hatfill, it is absolutely clear that The Times *falsely* accused him of the anthrax murders. The Times does not dispute that even its supposed bioterrorism expert, Barbara Rosenberg, had never heard of Hatfill before those murders. And it is plain that Kristof *partially* fabricated the allegations implicating Hatfill in the killings. Because the Fourth Circuit's decision conflicts with precedents of this Court and other circuits, certiorari should issue to review the lower court's public figure and actual malice holdings.

I. THE FOURTH CIRCUIT'S HOLDING THAT HATFILL IS A PUBLIC FIGURE WARRANTS REVIEW.

1. In *Gertz*, 418 U.S. at 341, the Court struck a balance to prevent media self-censorship while preserving "the individual's right to the protection of his own good name." A central feature of *Gertz*'s balance is that when analyzing limited-purpose public figure status courts must identify the *particular* public controversy giving rise to the defamation. *See id.* at

345. Hatfill has consistently maintained that, under *Gertz*, "any general public debate concerning the nation's preparedness for biological attack" in which he participated in 1997 and 1998 is "*not* the 'particular' public controversy giving rise to the defamation," Pet. 12, which concerned the 2001 anthrax murders.

The Times demonstrates that the Fourth Circuit paid lip service to *Gertz*, but that is not the same as following it. Below, Hatfill argued that under *Gertz* the court should first identify the "'particular' public controversy giving rise to The Times' defamation of Hatfill," and then consider Hatfill's role, if any, in "*that* controversy." Hatfill Br. 24-26. The Times disagreed, "argu[ing] that ... [*Gertz*'s] 'use of the word "particular" signifies only that a court must identify the specific or "particular" controversy or controversies fairly addressed *by the publication* at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified.'" Pet. App. 19a (emphasis added and citation omitted). The lower court "agree[d] with" The Times and found that the articles concerned "the government's efforts to protect the nation from a bioterrorist attack." *Id.* at 20a, 21a. In short, at The Times' urging the lower court defined the controversy to correspond to the subject on which Hatfill had made public appearances years earlier, and found that he could therefore be falsely accused of the anthrax killings (absent actual malice) even though he had not thrust himself into the particular controversy concerning the attacks.

But there is a fundamental difference between identifying the controversy *giving rise to the defamation* (as *Gertz* requires), and identifying the controversies "fairly addressed *by the publication*" (as the lower court did). Hatfill's petition presented hypotheticals illustrating why the lower court's approach "has dire implications for public discourse." Pet. 13. Specifically, any expert may (again, absent actual malice) be falsely accused of any crime related to his area of expertise, so long as the publication includes discussion of the broader issues as well as the crime. *See id.* at 14.

The Times' opposition acknowledges that these "dire consequences" *do* flow from the Fourth Circuit's adoption of its arguments. Specifically, The Times argues – as it must, to defend the Fourth Circuit's decision – that an expert on gun control "would surely be a public figure for purposes" of an article accusing him of a gun crime regardless of whether he had thrust himself into the controversy concerning the crime. Opp. 27-28 n.17. To make this sound less outrageous, The Times assumes an article "reporting" that the gun expert committed a heinous crime. But, of course, that is not the proper frame of reference. The issue posed by the "public figure" category is whether a reporter would be entitled (absent actual malice) to *falsely* accuse a gun expert of a gun crime with which he had no connection merely *because* he participated in an earlier debate about gun control.

The Times is wrong in contending that this issue involves only "application of law to fact." *Id.* at 24. Under the legal standard adopted by the court below,

as long as a defamer mixes in some discussion of broader issues, gun experts may be falsely accused of shooting people for criticizing gun control, nuclear weapons experts may be falsely accused of terrorist acts, and so on. The particularity aspect of the legal standard set forth in *Gertz* prevents these absurd results and preserves the *balance* between protecting the press and protecting individual reputations. In contrast, the lower court's conflation of broad societal debates with particular controversies giving rise to defamation eviscerates the legal standard articulated by *Gertz*.

2. The Times attempts to downplay the outrageousness of the Fourth Circuit's standard by arguing that Hatfill would fare no better under a *Gertz* inquiry properly focused on his alleged participation in the particular controversy surrounding the anthrax murders. But the record is clear that, after the attacks, Hatfill did no more than respond to a handful of inquiries from reporters who wanted to accuse him of murder. For example, Hatfill "spoke with" reporters from ABC who *sought out Hatfill* in an attempt to confront him with an accusation of murder. *See* Pet. 5. The Times does not (and cannot) deny that this is what happened, but claims that the facts were "inadmissible 'evidence.'" Opp. 26. This case, however, was decided on summary judgment and "facts" (which are flatly untrue) may not properly be assumed *against* Hatfill.

The Times' claim that Hatfill had an "apparently insatiable appetite for lunches, dinners and other voluntary interactions with reporters following the

attacks," *Id.* at 26, is another half-truth. The meetings to which The Times refers *all occurred after Kristof's accusations had been made.* Hatfill did "voluntarily interact" with a handful of reporters then to vociferously deny that he was the anthrax killer. But individuals accused of murder are highly motivated to deny such accusations, quite apart from culinary enticements, and that does not for a moment suggest that Hatfill "voluntarily" thrust himself into the controversy surrounding the anthrax investigation. Pet. 17-18.

3. The Times fails to reconcile the divergent circuit court cases addressed by the petition. *Id.* at 18-24. As we showed, courts applying *Waldbaum*'s three-pronged approach – which begins by "isolat[ing] the public controversy" – find that a "general concern or interest" reflected in a broad debate "will not suffice" to constitute a particular public controversy under *Gertz*. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-97 (D.C. Cir. 1980). On the other hand, courts applying the looser approach to identifying a public controversy find public appearances "relating to" a broad controversy sufficient to justify public figure status. *See, e.g., Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (finding false allegations that an author of "racy" books appeared in an orgy scene in an adult movie sufficiently related to a broad "controversy" about gender equality). This Court should articulate a standard for identifying limited purpose public figures such that different circuit courts will reach similar results on similar facts.

II. THE FOURTH CIRCUIT'S "ACTUAL MALICE" HOLDING WARRANTS REVIEW.

1. Hatfill argued at length in the court of appeals that malice was shown by Kristof's false claims that Hatfill (1) dispensed Cipro to visitors to a "safe house," (2) failed three FBI polygraph examinations, (3) used an "alias" (which Kristof failed to disclose was "Hatfield"), and (4) was identified by bloodhounds with inherently improbable powers.[1] As this Court recognized in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), a jury is likely to conclude that fabrication shows actual malice. If a reporter is confident of the truth of his assertion, there is no reason to distort the facts to make the allegation seem stronger than it is. Yet the Fourth Circuit failed even to mention the four claims Hatfill emphasized as showing malice.

Below, Hatfill and The Times disputed whether a defamation plaintiff must show that false allegations were *completely* or only *partially* fabricated. *See* Times Br. 58; Hatfill Reply Br. 29 & n.10. The Fourth Circuit's decision concluded that some non-fabricated evidence implicated Hatfill, Pet. App. 24a, stated that a defamation plaintiff must show that allegations were "*completely* fabricated," emphasizing "completely," *id.* at 25a, and failed to address the four false statements

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[1] The Times suggests that our evidence of malice relies on statements in Kristof's May 2002 column, which it claims makes reliance on them "time-barred." Opp. 15 n.7. That contention is wrong for many reasons, but it suffices to note that the four false allegations Hatfill emphasized come from later columns. *See* Pet. App. 76a (July 2 column) (Cipro and the "alias"), 87a (August 13 column) (polygraphs and bloodhounds).

mentioned above. The Times says (Opp. 36) that the Fourth Circuit found that Hatfill's evidence, "even if credited," does not establish malice, but the court said no such thing. That is how the court should have proceeded – to review all the evidence and consider it in the aggregate – but because it applied the wrong legal standard that is not what it did.

Nor is there merit to The Times' contention *(Id.* at 29) that the Fourth Circuit's decision on this point is "derived directly from *St. Amant*." There this Court stated that a jury is likely to find malice "where a story is fabricated by the defendant." 390 U.S. at 732. But there is a world of difference between saying that a jury will find malice where a story is "fabricated" and saying that a jury can consider malice only if a story is "*completely* fabricated." *See Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 692 n.37 (1989) (noting "[t]he defamer may be [all] the more successful when he baits the hook with truth") (citations omitted).[2]

2. The bulk of The Times' discussion of malice is devoted to presenting a one-sided version of the facts. Even apart from the fact that "[o]n summary judgment, we must draw all justifiable inferences in favor of the nonmoving party," *Masson*, 501 U.S. at 520, The Times' attempted rebuttal is feeble. With respect to the false allegation that Hatfill dispensed

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[2] The Times notes that the court's statement that a *complete* fabrication is required also recognized other possible means of establishing malice, such as reliance on "an unverified anonymous telephone call." Opp. 29 (citations omitted). Here, no anonymous calls are at issue; the question is whether partially fabricated claims establish malice.

Cipro – an antibiotic used to treat anthrax – to visitors to a "safe house," The Times responds by contending that it is "undisputed that Cipro was discussed by Hatfill." Opp. 33. *Discussed*? The sting of Kristof's allegation was that Hatfill *dispensed* Cipro to visitors to the "safe house," suggesting that he had used the location to convert wet anthrax to its dangerous dry state. The Times will be free to argue to a jury that Kristof's allegation was essentially true because Hatfill *discussed* Cipro at the safe house and unrelatedly *dispensed* Cipro elsewhere, but a jury is unlikely to agree.

The Times similarly has no answer to the false allegation that Hatfill failed three FBI polygraph examinations. As matters stand, The Times may not claim that FBI agents told Kristof that Hatfill failed three polygraph examinations because Kristof disobeyed a court order to identify the agents. The Times will be required at trial to rely on its defense that the claim is true because Hatfill's FBI polygraph "involved more than one test sequence." *Id.* at 35 (citation omitted). A jury would rightly conclude, if Kristof testifies that he said Hatfill failed three polygraph examinations because he took one test with three parts, that such a claim itself shows reckless disregard for the truth.[3]

With respect to the Hatfield "alias," The Times shamelessly blames Kristof's research assistant for the

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[3] Citing JA224, The Times alleges that there is an FBI record that refers to a "second polygraph." Opp. 35. The handwritten statement says "record polygraph."

untruth. *See id.* at. 34. But it is undisputed that Kristof knew that the alleged "alias" was "Hatfield." A jury could reasonably conclude that Kristof concealed this important fact from his readers because an allegation that a person has an alias supports the assertion that he has committed a crime, but an assertion that a person named "Hatfill" sometimes gets called "Hatfield" merely shows that mistakes happen.

With respect to the bloodhounds, any competent reporter would have questioned whether a bloodhound can obtain a scent from an eleven-month-old envelope that had been irradiated and was known not to have any DNA. And another reporter had already debunked a key part of the bizarre story – that the bloodhounds alerted in a Denny's restaurant in Louisiana where Hatfill had dined – by calling all of the Denny's restaurants in Louisiana and determining that there had been no visits by bloodhounds. JA1951. He also quoted "[t]hree veteran bloodhound handlers" who were "skeptical that a useful scent ... would ... remain[] on the letters." *Id.* Kristof nevertheless reported that bloodhounds "responded strongly to Dr. Hatfill ... as well as to restaurants that he had recently entered." Pet. App. 87a. A jury could reasonably conclude that Kristof recklessly included the story because he thought it added credence to his accusation of Hatfill.[4]

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[4] The Times complains that the bloodhound evidence and some of the other statements showing malice were not "alleged to be false in Hatfill's Complaint." Opp. 32. This is nonsense. Evidence relating to malice is usually obtained during discovery, and there

The Times also argues that Kristof reasonably relied on allegations he heard from others, primarily Barbara Rosenberg. But Kristof was warned by *three* people not to trust Rosenberg. One of Kristof's colleagues at The Times, William Broad, emailed Kristof that if the allegation that Hatfill made the anthrax at an isolated "safe house" came "from Barbara i would be very suspicious." JA1881. Another colleague, Judith Miller, told Kristof that Rosenberg was "vindictive" and "prone to fabrication." JA1921. And one of Kristof's other sources warned Kristof not to "believe everything Barbara says." JA1861. A jury should decide whether, in light of these warnings, Kristof had doubts about Rosenberg's claims or recklessly advanced them.

3. The holding below is inconsistent with numerous decisions of this Court and other courts of appeals. The Times discusses only one of the cases we cited in our petition, contending that *Harte-Hanks* is distinguishable because the newspaper in that case failed to interview "the one person who could corroborate [the] defamatory claims." Opp. 33, n.20. Here, the logical person to contact was the owner of the alleged safe house, George Borsari, and Kristof failed to do so, so the case is not distinguishable on the ground advanced by The Times.

In the petition, we showed that the holding below is inconsistent with *Masson*, *Rebozo*, and *Crane*. The Times cites none of those cases. As we showed, there

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is no requirement (or reason) why facts relating to malice must be included in a complaint.

was a basis in fact for the defamatory allegations in each of those cases – a stronger basis than here – so the allegations were not *completely* fabricated. But this Court, the Fifth Circuit, and the Ninth Circuit held that the plaintiff in each case had presented evidence on which a reasonable jury might conclude that the defamer had doubted the truth of his allegation or acted recklessly – evidence that was considerably less extensive than the evidence presented by Hatfill. The decision below cannot be reconciled with any of these three cases.

In *Tavoulareas*, the en banc D.C. Circuit held that defamation plaintiffs are "entitled to an aggregate consideration of all their evidence." 817 F.2d at 794 n.43. In the petition, we noted that the "aggregate consideration" issue is an important and recurring issue, and explained that the Fourth Circuit's approach cannot be reconciled with the D.C. Circuit's approach. The Times' silence with respect to *Tavoulareas* and the other cases further shows that there is a conflict warranting this Court's attention.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730 1300
* *Counsel of Record*

November 2008